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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

State of Kansas, *Petitioner*,

v.

Leroy Hendricks, *Respondent.*

On Petition For Writ Of Certiorari
To The Kansas Supreme Court

CONDITIONAL CROSS PETITION

Thomas J. Weilert
Counsel of Record
250 N. Water, Suite 215
Wichita, Kansas 67202
(316) 263-9323

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135 pp

QUESTIONS PRESENTED

1. IS THE KANSAS ACT PROVIDING FOR LONG TERM, INDEFINITE CONFINEMENT OF SEXUALLY VIOLENT PREDATORS, K.S.A. 59-29a01 *et seq.*, EVEN THOUGH LABELED A CIVIL PROCEEDING, SO PUNITIVE EITHER IN PURPOSE OR EFFECT AS TO REQUIRE THAT IT MUST BE CONSIDERED CRIMINAL?

2. DOES THE KANSAS SEXUALLY VIOLENT PREDATOR ACT VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY?

3. DOES THE KANSAS SEXUALLY VIOLENT PREDATOR ACT VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS?

4. DOES THE KANSAS SEXUALLY VIOLENT PREDATOR ACT FAIL TO PROVIDE EQUAL PROTECTION UNDER THE LAW AS GUARANTEED BY THE CONSTITUTION?

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No. 95-1649

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

State of Kansas, *Petitioner,*

v.

Leroy Hendricks, *Respondent.*

Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

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CONDITIONAL CROSS PETITION

The Respondent files this conditional cross petition requesting that if this Court grants the review sought by the State of Kansas in this matter, that such review include issues concerning violations of ex post facto, double jeopardy and equal protection provisions of the United States Constitution not addressed by the Kansas Supreme Court in its March 1, 1996, decision holding that the Kansas Sexually Violent Predator Act violates substantive due process principles.

OPINION BELOW

The opinion of the Kansas Supreme Court, to be reported at 912 P.2d 129, is included as Appendix A. App1a-59a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The ex post facto clause of the United States Constitution states, " No state shall... pass any...ex post facto law." U.S.Const. Art. 1, Sec. 10.

The double jeopardy clause of the United States Constitution states, "...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;" U.S. Const. Amend. V.

The equal protection clause of the United States Constitution states, "No state shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend XIV.

The Kansas Sexually Violent Predator Act is set forth in its entirety in Appendix B. Various Kansas statutes cited in the cross petition are set out in Appendix C. The Kansas Treatment Act for Mentally Ill Persons is attached as Appendix E.

STATEMENT OF THE CASE

In 1984, the Respondent, Leroy Hendricks, was charged with three counts of indecent liberties with a child, all Class C felonies. At that time, the maximum possible penalty for each offense was a indeterminate term of 5 to 20 years imprisonment. App. 69a, K.S.A. 21-3503 and K.S.A. 21-4501(c). The court could have ordered those sentences to be served consecutively. Given Respondent's prior felony convictions for similar offenses, pursuant to the provisions of

the habitual criminal act, App. 69a, K.S.A. 21-4504(b), if convicted of all three counts, the Respondent could have been sentenced to a term of imprisonment of 45 to 180 years. He would have been first eligible for parole in 2007 and his required release date, assuming he accumulated all possible good time, would have been 2074. App. 72a, 73a, K.S.A. 22-3717(a)(c)(1), 22-3718.

The State elected not to pursue consecutive sentences or enhancement under the habitual offender provisions. Instead, the State and the Respondent reached a plea agreement. In that agreement, the District Attorney for the Eighteenth Judicial District agreed to, 1) dismiss one count of the information, 2) not request imposition of sentence under the habitual criminal act, 3) recommend that the Respondent be sentenced to a term of imprisonment of 5 to 20 years on each of the two remaining counts and 4) recommend that the sentences on the two remaining counts run concurrently with each other. For his part of the bargain, Respondent agreed to waive his various constitutional rights and enter pleas of guilty to the two remaining charges.[1] He did so.

The State made no allegation at the time of the plea agreement or sentencing that Respondent was in need of treatment for any mental condition. Mental evaluation and treatment was available as an option. If the evaluation had found treatment necessary, Respondent could have been sent to a secure psychiatric facility until treatment was no longer of help. He would then have been returned to the court for sentencing. The time in the hospital would have counted toward any sentence imposed. App. 71a, 72a, K.S.A. 22-3429, 22-3430, 22-3431.

The Court sentenced the Respondent to a term of 5 to 20 years on each count to run concurrently in accordance with the agreement. Under the provisions of K.S.A. 22-3718, App.

[1] The record contains no explanation for why the State offered such an agreement to Respondent.

73a, the Respondent's conditional release date was September 11, 1994. That was the latest date the Respondent could have been incarcerated by reason of the sentence imposed.

Respondent served his sentence without incident. He did not present any behavioral problems. He engaged in no predatory acts, sexual or otherwise. He earned all the good time possible and was scheduled to be released from confinement, at the expiration of his sentence, on September 11, 1994. (R. Vol. 8 pp. 12-25)[2] Respondent would have been 60 years old sixteen days after the date of his projected release. (R. Vol. 14 p. 204)

THE KANSAS SEXUALLY VIOLENT PREDATOR ACT

During the summer before Respondent's pending release, the Kansas Legislature passed a number of measures to increase the punishment for persons who were convicted of sex crimes. The legislation doubled the sentences for some violent crimes. 1994 Kan. Sess. Laws, Ch. 252. In addition the legislature passed a statute permitting an upward departure from the sentencing guidelines for a criminal defendant found to be a "predatory sex offender". The enhancement provision defines a predatory sex offender as one who has been convicted of a crime of extreme sexual violence and who, "suffers from a mental condition or personality disorder which makes the offender likely to engage in additional acts" constituting sexual crimes. App. 74a, K.S.A. 21-4716.

While those enactments provided for longer prison terms for persons who committed crimes after their effective dates, they did nothing to address the concerns that had arisen out of the murder of a young woman by a person who had been released on parole a short time before crime. The woman's family, aided by law enforcement officials, parole officers and a group of legislators, formed an ad hoc Sexual Offenders Task Force. That group lobbied heavily for the

passage of legislation that would allow the continued incarceration of persons who had completed their sentences. App. 25a, 26a.

Those efforts were rewarded with the passage of the Sexually Violent Predator Act. App. 60a-68a, K.S.A. 59-29a01 et. seq. The act was patterned after a Washington State statute that was passed in 1992. The Act provides for a "civil commitment" of persons who are deemed dangerous but not mentally ill. App. 20a. In the preamble to the legislation, the legislature makes the "finding" that there is a "small but extremely dangerous group" of "predators" who do not have a mental defect or disease rendering them appropriate for involuntary treatment under the existing involuntary treatment statutes. The legislature also finds that this group must consist of persons already serving prison sentences following conviction for a sex crime or be confined after a finding of insanity or incompetency. Further, members of this group are found to have "antisocial personality features" which are unamenable to existing mental treatment modalities and are likely to engage in future acts of sexual violence. The legislature also determined that the prognosis for rehabilitating such persons was "poor" and the treatment needs are "very long term". App. 60a, K.S.A. 59-29a01.

The Act defines "sexually violent predator" as:

> "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." App. 60a, K.S.A. 59-29a02(a)

The Act defines "mental abnormality" as:

> "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." App. 60a, K.S.A. 59-29a02(b).

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[2] R. Vol. Refers to the volume of the record on appeal filed with the Kansas Supreme Court.

There are extensive procedural provisions. The petition to have a person declared a sexually violent predator is filed shortly before a persons release from custody. After the filing, a probable cause finding is required. If one is made, the matter goes to a trial where either party can request a jury. If the person is found to be a sexually violent predator, there is a commitment to the custody of the Secretary of Social and Rehabilitative Services. The person is segregated from mentally ill persons. There is no provision for rights and privileges similar to those granted other persons in State custody following civil commitments. App. 64a, K.S.A. 59-29a07

Release procedures under the Act are much more restrictive than those contained in the civil commitment for mental illness statutes. All other persons in custody of SRS by means of a civil commitment are allowed release upon the order of the head of the treatment facility. App. 101a, K.S.A. 59-2925. Under the Act, the release of a person begins with "probable cause" to believe that a person's mental abnormality or personality disorder has so changed that the person is safe to be at large and not engage in acts of sexual violence. That determination must be made at an annual review by the committing court. The review is based upon a report from SRS and, if the court orders, a hearing at which the committed person does not appear. If a probable cause hearing is made, a trial is had where either the State or inmate may demand a jury. At the trial, the State must prove beyond a reasonable doubt that the person is still a sexually violent predator. Without the finding of probable cause or a petition for release by SRS, A person is not entitled to an in person hearing on a request for release. App. 65a, 66a, K.S.A. 59-29a08, 29a10, 29a11.

THE COMMITMENT PROCEEDINGS IN THIS CASE

On August 17, 1994, the District Attorney for the Eighteenth Judicial District filed a verified petition alleging the Respondent to be a sexually violent predator (R. Vol.1 pp.8-10) On

August 19, 1994, a probable cause hearing as required by the Act was held.. (R. Vol.8 p.3) At that hearing, Respondent moved for dismissal of the petition on the grounds that it violated various constitutional provisions including ex post facto, double jeopardy, substantive due process and equal protection as well as the plea agreement entered into between the Respondent and the State in the criminal case in 1984. (R. Vol.8 pp.3-6) A ruling on those motions was deferred by the court. (R. Vol. 8pp. 10-11)

Based upon the evidence presented and the information contained in the court and Department of Corrections files, the court found there was probable cause to believe that the Respondent was a sexually violent predator. The court ordered him to Larned State Security Hospital for an evaluation by a professional qualified person to determine if the Respondent is a sexually violent predator. (R. Vol. Pp. 22-24)

On or about September 6, 1994, a letter was received by the court indicating that the evaluation procedures at Lamed State Hospital had been completed and that the report was submitted with the letter. The report, signed by Charles R. Befort, Ph.D. Licensed Psychologist stated that the Respondent had reported that he was advised by his attorney not to participate in the evaluation process, and he did not do so. (R. Vol. 11 pp.24-25) Respondent contended that the commitment proceeding was a criminal procedure and he had a Fifth Amendment right not to incriminate himself. The State filed a motion to compel his cooperation in the evaluation. The court found the Act to be civil in nature and ordered Respondent to cooperate or sanctions would be imposed.

At a pretrial hearing, the State presented evidence from the SRS employee in charge of starting the program for the custody of persons committed under the Act. That evidence showed that the place of the custody would be in a Department of Corrections, maximum security

facility. The perimeter security and security at the interior control room would be provided by DOC personnel. The persons committed under the Act would share outdoor recreation areas, gyms, libraries and weight rooms with DOC inmates. They would also have the same food service, laundry, medical treatment and the same type shower facilities and rooms. (R. Vol) 12 pp.20-59)

Prior to the trial, the court denied the Respondent's motion to dismiss for the reason that the proceedings under the Act violated certain provisions of the United States Constitution. Those rulings left the Respondent available to testify at the trial.

At the commitment trial, the State began its case by calling Respondent to testify. Mr. Hendricks outlined his family background,(R. Vol. 14 pp. 205-209) as well as his previous sexual offenses against children.(R. Vol. 14 pp. 209-247) He stated that during his latest incarceration he had received no treatment for any sexual disorder.(R. Vol. 14 pp.254, 255) He stated that he had not had any urge to have sexual contact with children since 1985, (R. Vol. 14 p.261) and he was aware that if he re-offended, he would spend the rest of his life in prison. (R. Vol. 14 p.261) He acknowledged however, that he was a "pedophile" and while he hoped that he would not re-offend, the only way he could "guarantee" that he never would was to die. (R. Vol. 14 p. 264)

Dr. Charles Befort, the chief psychologist at Larned State Hospital, testified for the State. He stated that Respondent was not mentally ill, nor was he suffering from a personality disorder.(R. Vol. 14 pp. 367, 368) He also stated that the term "mental abnormality" was not a proper diagnostic term. He acknowledged that the term "mental abnormality" was circular, in that the behavior---predisposition to commit sex crimes---was used both to determine the condition and predict the behavior. (R. Vol. 14 p. 374) He did identify Mr. Hendricks as a

pedophile and stated his belief that Respondent would engage either in acts of sexual violence or sex acts with children if permitted to do so.(R. Vol. 14 p. 357)

The State also presented evidence from some of Respondents victims. Those included a woman to whom he exposed himself in 1957, some thirty seven years prior to the trial.

Dr. William Logan testified for the Respondent. Dr. Logan is a board certified forensic psychiatrist. In his testimony, Dr. Logan said that historically psychiatrists and psychologists have been called upon to predict future dangerous behavior. He indicated that up to about the late 1960's there was a lot of optimism about the ability to predict dangerousness. Then a series of five studies indicated that the predictions of dangerous behavior made by psychiatrists and psychologists were wrong approximately two-thirds of the time. (R. Vol. 14 p. 416) Dr. Logan further testified that in studies dealing with recidivism of pedophile, the average re-offense rate following treatment was about 15 percent and the average re-offense rate without treatment was 17.5 percent. (R. Vol.15 p. 467) Dr. Logan expressed an opinion held to a reasonable degree of medical probability or certainty that a psychologist or psychiatrist cannot predict whether an individual is more likely than not to engage in a future act of sexual predation. (R. Vol. 15 p. 469)

Following instructions and closing arguments, the jury deliberated and found the Respondent to be a sexually violent predator. (R. Vol. 15 p. 528) Respondent filed a motion to dismiss or in the alternative for a new trial which was heard on October 20, 1994. At that hearing, the Respondent presented evidence that SRS had not entered into any contracts with a provider to furnish sexual predator treatment. The only treatment staff available was that which had previously been at the Larned State Hospital. (R. Vol.16 pp. 6-12) The motion was overruled.

Following the finding that he was a sexual predator, the Respondent was committed to Larned State Security Hospital. In February, 1995 he was moved to the Larned Correctional Mental Health Facility, which is maintained by the State Department of Corrections. Dr. Befort, now acting Clinical Director of the Sexual Predator Treatment program, testified in a subsequent state habeas corpus hearing that persons committed under the Act were not receiving any treatment. Indeed, Dr. Befort testified that he did not feel fully qualified to head the sexual predator treatment program. App. 81a. Dr. Befort stated that the primary contact he had with Respondent and others committed under the Act was in a group session that he attempted when his schedule permitted. He said the focus of the sessions was the lack of treatment and that there was little if any discussion of the sexual deviancy issues which had led to the commitments. App. 87a. Dr. Befort concluded that the Respondent and the other persons committed under the Act had received virtually no treatment. App. 80a.

OPINION OF THE KANSAS SUPREME COURT

Respondent appealed the Jury's finding. He argued that the Act, even though labeled "civil" was punitive in purpose and effect. Because of that, he contended that the Act violated the prohibition against double jeopardy and ex post facto laws. He also argued that he had been denied equal protection of the law because of the different treatment and procedures provided for persons committed under the Act as opposed to other civil commitment laws. Respondent further asserted that his substantive due process rights were violated by the Act which calls for indefinite incarceration of persons without a finding of both dangerousness and mental illness. App. 10a. The Kansas Supreme Court agreed with the Respondent's argument that his substantive due process rights were violated. The Court did not decide the other constitutional issues raised.

The Kansas Court held that the Sexually Violent Predator Act authorizes the confinement of persons "upon a showing of dangerousness without a finding of mental illness." App. 20a. The Court's decision was based upon a review of the State's expert testimony stating that the term "mental abnormality" was not a proper diagnosis. It also relied on the fact that the definition of "mental abnormality" is circular in that past behavior is used to describe a condition and that condition is then used to predict behavior.

Perhaps most importantly, the Court relied on the testimony of Dr. Befort that the Respondent was not mentally ill as the term is defined in state statutes. This Court's decision in Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437(1992), instructed the Kansas Court that without the presence of both dangerousness and mental illness there can not be a valid civil commitment. App. 20a.

While the Kansas Court did not directly address the issues of double jeopardy, ex post facto and equal protection, it did make findings which are relevant to them. The majority concluded:

> "It is clear the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under K.S.A. 59-2901 et. seq. If there is nothing to treat under 59-2901, then there is not mental illness." App 16a.

The Court cites with approval the conclusions reached in Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995), on appeal, No. 95-35958 (9th Cir.)(argued March 7, 1996), by the Federal District Court in holding the Washington Act which is nearly identical to the Kansas Act unconstitutional. In the portion of that opinion dealing with double jeopardy and ex post facto considerations, the court observed:

> "The statute forecloses the possibility that offenders will be evaluated and treated until after they have been punished. Of course, it defies reason to suggest that the mental abnormalities or personality disorders causing violent sexual predation surface only at the termination of a prison term. Common sense suggests that such mental conditions, if they are indeed the cause of sexual violence, are present at the time the offense is committed. Setting aside the question of whether a prison term exacerbates or minimizes the mental condition of sex offender, it plainly delays the treatment that must constitutionally accompany commitment pursuant to the statute. The failure of the statute to provide for examination or treatment prior to the completion of the punishment phase strongly suggests that treatment is of secondary, rather than primary concern. 898 F. Supp. at 753.

The Kansas Court went on to conclude, "It is clear that the primary objective of the Act is to continue incarceration and not to provide treatment." App 16a, 17a.

REASONS FOR GRANTING THE CROSS PETITION

I. THIS CASE PRESENTS UNIQUE ISSUES REGARDING THE APPLICATION OF THE EX POST FACTO AND DOUBLE JEOPARDY CLAUSES TO INDEFINITE, LONG TERM COMMITMENTS WHICH ARE LABELED "CIVIL" BY THE LEGISLATURE.

In its petition for a writ of certiorari, the State alleges that state policy makers as well as lower state and federal courts urgently require guidance from this Court in order to asses the constitutionality of the various options that states might consider implementing to deal with the very serious problem of sexually violent predators.

As set out in detail in the Brief of Opposition filed herein, Respondent strongly contends that he Kansas Supreme Court correctly applied the substantive due process set out in this Court's decision in Foucha V. Louisiana, supra. The Kansas Court held that the Act, allowed the commitment of a person upon a showing of dangerousness with out a finding of mental illness. The Court based that finding on the circular definition of "mental abnormality" and the testimony of the State's own expert that the Respondent was not mentally ill App. 19a, 20a. With the

holding that Respondents substantive due process rights were violated, the Kansas Court did not address the other constitutional issues presented in this case.

Respondent asserts that a review of the Kansas Court's decision would be of limited value in providing the guidance the State seeks in its petition. Because the Kansas Court did not reach the issues of whether the Act violates constitutional protections against ex post facto laws and double jeopardy this Court's review of only the substantive due process issue would leave policy makers with no guidance in significant issues. Therefore, if and only if this Court should decide to grant the State's petition, then Respondent would request the Court to broaden its review to include the issues presented under the ex post facto and due process clauses of the Constitution.

a) There is no decision of the Court directly addressing the issue of whether, for purposes of the ex Post facto clause, a law is criminal or penal, as opposed to civil.

If the Court review the Kansas Supreme Court decision in order to provide guidance to policy makers and lower courts, an important area in which such guidance is needed is in relation to the ex post facto clause of the U.S. Constitution. That clause provides that "No state shall... pass any... ex post facto law." (Article 1, Section 10). In interpreting the scope of that prohibition, courts have long been guided by the words of Justice Chase in Calder v. Bull, 3 Doll. 386, 1 L. Ed. 648 (1798). Justice Chase explained the scope of the prohibition as follows:

> "[1] Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. [2] Every law that aggravates a crime, or makes it greater than it was when committed. [3] Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. [4] Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." 3 Dall. at 390(emphasis omitted).

The ex post facto clause ensures that legislative acts "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 964 (1981). In order for a criminal or penal law to be ex post facto: (1) "it must be retrospective, that is, it must apply to events occurring before its enactment," and (2) it must disadvantage the offender affected by it." Weaver, 101 S. Ct. At 964.

The initial question to be answered in the determination of whether the Act offends the ex post facto prohibitions is whether the Acts are civil or penal in purpose and effect. Even though the Act is labeled a "civil commitment" procedure, that is not determinative. Collins v. Youngblood, 497 U.S. 37,110 S. Ct. 2715, 2721, 111 L. Ed. 2d 30 (1990), where the legislature has indicated an intention to establish a civil scheme, the Court must consider whether that scheme is "so punitive in purpose or effect as to negate that intention. "United States v. Ward, 448 U.S. 242, 100 S. Ct. 2636, 2641, (1980).

The Act, through its provisions for complete loss of freedom for an indefinite period, probable long term confinement, limited release opportunity and delay of any treatment until after an offender is certainly arguably penal in purpose and effect.

There is no decision of this Court which directly addresses how, for purposes of the ex post facto clause, the determination of whether a law is criminal or penal is to be made. Guidance on how that question should be answered is needed.

b) There is an important federal question of whether the Act offends the ex post facto and double jeopardy clauses of the U.S. Constitution.

Respondent raised important federal questions in his appeal to the Kansas Supreme Court that the Court did not address. Even though the issues were not discussed by the majority, they

would be of importance in a decision by this Court meant to proved guidance for policy makers and lower federal and state courts.

The Fifth Amendment to the United States Constitution states in part: "No person shall... be subject for the same offense to be twice put in jeopardy of life or limb." There are essentially three protections that flow from these provisions: protection from (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. Brown v. Ohio, 432 U.S. 161,165, 97 S. Ct. 2221, 53 L. Ed. 2d 187(1977).

As with ex post facto considerations, the label of "civil" is not controlling when examining a double jeopardy question. Violation of the double jeopardy clause "can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state. "United States v. Halper, 490 U.S. 435, 109 S. Ct. 1892, 1901(1989). Justice Blackman, writing for a unanimous Court, after examining the historical concept that punishment serves the twin aims of retribution and deterrence, states:

> "From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." Halper at 109 S.Ct. 1901-02.

The same factors that cause concern under the ex post facto clause; complete loss of freedom for an indefinite period, probable long term confinement, limited release opportunities, and delay of any treatment until after an offender has served nearly all of his sentence raise a serious question of whether this "civil" sanction can be said to solely serve a remedial purpose.

There is a conflict in the reported of other courts that have considered the questions. The Washington Supreme Court in the case of In re Young, 857 P. 2d 989 (Wash. 1993), held that he

Washington version of the Act did not violate the ex post facto and due process clauses. That decision is contrary to the conclusion reached later by a federal district court in reviewing the same Act. Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995), on appeal, No.95-35958 (9th Cir.) (argued Mar. 7, 1996). The Wisconsin Supreme Court has agreed with the Washington Supreme Court on the issue. State v. Carpenter, 541 N.W. 2d 105, 113 (Wis. 1995). If this Court reviews the decision of the Kansas Supreme Court to provide guidance, these difficult and recurring issues should be addressed.

II. THE ACT FAILS TO PROVIDE EQUAL PROTECTION OF THE LAW FOR THOSE COMMITTED UNDER IT.

The equal protection clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall.. deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV. In the Kansas Supreme Court, the Respondent argued that the Act violates that provision because of the disparate treatment of persons committed under it and those committed under the state's mental illness commitment procedure. The Kansas Court did not address this issue. If this Court reviews the Kansas Court's decision to provide guidance to policy makers and lower courts, this important issue should also be reviewed.

"The Equal Protection Clause provides that 'all persons similarly circumstanced shall be treated alike.'" Pyler v. Doe, 457 U.S. 202, 72 L. Ed. 2d 786, 798, 102 S. Ct. 2382 (1982) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 64 L. Ed. 989, 40 S. Ct. 560 (1920)).

This Court recognizes the discretion of state legislatures to create classifications "that roughly approximate the nature of the problem perceived, [and] that accommodate competing concerns both public and private," and generally requires only "the assurance that the

classification at issue bears some fair relationship to a legitimate public purpose," in order to uphold the challenged statute. Pyler, 64 L. Ed. 2d at 799. However, this Court has "treated as presumptively, invidious those classifications that disadvantage a 'suspect class' or that impinge upon the exercise of a 'fundamental right'." Pyler, Id.

Liberty is a fundamental right of all individuals and confinement in a mental institution is a "massive curtailment of liberty." Vitek v. Jones, 445 U.S. 480, 491, 492, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980). Because the Act creates a classification involving a fundamental right it is subject to strict scrutiny. See Pyler, 72 L. Ed. 2d at 799. Therefore the state must show that its classification has been precisely tailored to serve a compelling governmental purpose.

The Act would allow the treatment of persons subject to its provision to be treated differently from other persons approaching the end of a criminal sentence as well as from other persons committed under the traditional commitment because of mental illness. Criminals approaching the end of their sentence are faced only with a period of supervised release, which may entail some restriction on lifestyle and activities, but generally regain the majority of their liberty. Person committed because of mental illness are guaranteed a number of rights which are not provided for persons committed under the Act. App. 101a-104a, K.S.A. 59-2927, 59-2929.

The Act fails to narrowly tailor those persons to whom it applies. A person charged or convicted of any felony sex crime can be subjected to it. Also, a person charged or convicted of any attempt, conspiracy or solicitation to commit any felony sex crime can be included in its provision. Further, a person charged or convicted of a crime in which it is alleged was sexually motivated can bring a person under the Act's domain. There is no requirement that the person be a repeat offender. App. 60a, K.S.A. 59-29a02.

The Act further violates the equal protection clause because it was standards and procedures which are significantly different than those used in commitments for mental illness. This Court has held, "There is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." Baxstrom v. Herold, 383 U.S. 107, 15 L. Ed. 2d 620, 624, 86 S. Ct. 760 (1966).

The most striking difference presented between a commitment under the Act and a commitment for mental illness are in the requirements needed for commitment and the release procedures. Under the Act, all that is required to be proved is a prediction of future dangerousness. In a commitment for mental illness, the Court must be satisfied that the person: 1) is suffering from a severe mental disorder to the extent that such person is in need of treatment; 2) lacks capacity to make an informed decision concerning treatment; and 3) is likely to cause harm to self or others. App. 81a, K.S.A. 59-2902(l).

The differences in the release procedures are obvious. The Act requires an annual review by the committing court to determine if there is probable cause to believe the persons "mental abnormality" has changed so as to make him safe for release. If such a finding is made, then the State can request a further examination of the person. Either party can request a jury trial, but at least a bench trial to determine if the person is still a sexually violent predator is required. While the persons committed can request a hearing, there is no requirement that it be granted unless authorized by the Secretary of Social and Rehabilitative Services. The court is directed to endeavor whenever possible to review the unauthorized petition as frivolous and deny the petition without hearing. App. 65a, 66a, K.S.A. 59-29a08, 29a10 & 29a11.

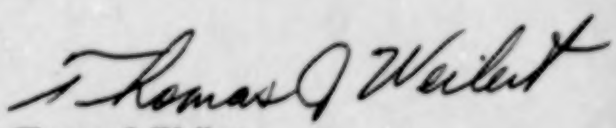
To the contrary, persons, committed for mental illness are granted reviews after the first 90 days and each 180 days thereafter. There is no restriction on the number of petition that can be filed and a hearing is required on each one. Furthermore, the head of he treatment facility an release a person committed upon his or her own order without any court involvement. App. 99a-101a, K.S.A.59-2924.

In In re Young, supra, and State v. Carpenter supra, the Supreme Courts of Washington and Wisconsin have upheld their sexual predator acts in the face of equal protection challenges. The Respondent suggests that those Courts decided the issue incorrectly. Therefore, in order to proved guidance to the states, if the Court decides to review this case, the review should included the equal protection issue.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that, if this Court grants the petition of the State in this matter, the review include the issues raised herein.

Respectfully Submitted,



Thomas J. Weilert
Counsel of Record
250 N. Water, Suite 215
Wichita, Kansas 67202
(316) 263-9323

[redacted]

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STATE OK KANSAS, ***Petitioner***

v.

LEROY HENDRICKS, ***Respondent***

APPENDIX
to
CONDITIONAL CROSS PETITION

APPENDIX A

Kansas Supreme Court Opinion

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 73,039

IN THE MATTER OF THE CARE AND TREATMENT
OF LEROY HENDRICKS,
Appellant.

SYLLABUS BY THE COURT

1.

The constitutionality of a statute is presumed, and all doubts must be resolved in favor of its validity. If there is any reasonable way to construe a statute as constitutionally valid, the court must do so.

2.

A statute must clearly violate the Constitution before the court may strike it down.

3.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that before an individual may be involuntarily committed for control, care, and treatment, the State must prove by clear and convincing evidence that the individual is both mentally ill and dangerous.

4.

The Sexually Violent Predator Act, K.S.A. 59-29a01 *et seq.*, which provides for the commitment for the long-term care and treatment of sexually violent predators, is examined and held to be unconstitutional as a violation of the substantive Due Process Clause of the Fourteenth Amendment to the United States Constitution, as more fully set forth in this opinion.

Appeal from Sedgwick district court; GREGORY L. WALLER, judge. Opinion filed March 1, 1996. Reversed.

Thomas J. Weilert, of Wichita, argued the cause, and *E.J. Greeno*, of Greeno & Boohar, of Wichita, and *Laura B. Shaneyfelt*, of Focht, Hughey & Calvert, of Wichita, were with him on the brief for appellant.

David Lowden, assistant district attorney, argued the cause, and *Nola Foulston*, district attorney, and *Carla Stovall*, attorney general, were with him on the brief for appellee.

Andrew L. Warren, of Overland Park, was on the brief for *amicus curiae* American Civil Liberties Union.

David Gottlieb, of Lawrence, *Jessica R. Kunen*, chief appellate defender, *Rebecca E. Woodman*, assistant appellate defender, and *Elizabeth Seale Cateforis*, assistant appellate defender, were on the brief for *amici curiae* Kansas Defender Project/Appellate Defender Office.

The opinion of the court was delivered by

ALLEGRUCCI, J.: Leroy Hendricks appeals from a jury finding that he is a sexually violent predator as defined in the Sexually Violent Predator Act (the Act), K.S.A. 59-29a01 *et seq.*, and from the district court's order of commitment, which was issued pursuant to that finding. The Act establishes a procedure, which is stated to be civil, for involuntarily committing sexually violent predators for long-term care and treatment. Hendricks challenges the constitutionality of the Act and also raises various other grounds for reversing the finding and order of the district court. The case was transferred to this court from the Court of Appeals pursuant to K.S.A. 20-3018(c).

This case was initiated by the district attorney's filing on August 17, 1994, of a petition in the district court seeking commitment of Leroy Hendricks as a sexually violent predator under the Act. The petition recited that it anticipated Hendricks' release from confinement on September 11, 1994, and stated the following criminal history:

> "That on the 26th day of November, 1984 respondent Leroy V. Hendricks was convicted in the Eighteenth Judicial District, District Court, Sedgwick County, Kansas, Case No. **84CR1463** of a sexually violent offenses [*sic*] involving two victims as defined by law, to wit: **K.S.A. 21-3503 Indecent Liberties with a Child; and K.S.A. 21-3503 Indecent Liberties with a Child; and has a history of prior sexual offenses from other jurisdictions, to wit: 1960 Spokane, Washington, Indecent Liberties with a Child; Seattle, Washington (1963 and 1967) Indecent Liberties with a Child (two separate cases).**"

The petition further alleged that Hendricks "suffers from a mental abnormality or personality disorder which makes him likely to engage in predatory acts of sexual violence."

At the time the petition was filed, Hendricks was serving a sentence of 5 to 20 years' imprisonment. The sentence had been imposed in accordance with the State's recommendation pursuant to a plea agreement. Under the agreement, Hendricks pled guilty in November 1984 to two counts of indecent liberties with a child. The State dismissed a third count of indecent liberties and refrained from requesting imposition of the Habitual Criminal Act.

On August 19, 1994, Hendricks appeared with counsel in district court. At the beginning of the hearing, Hendricks presented a motion to dismiss the petition. Counsel argued the following grounds for dismissal: insufficient factual allegations,

failure to serve Hendricks with the petition, unconstitutionality of the Act, and breach of the plea agreement. The district court allowed the State to present evidence. In a journal entry filed on August 23, 1994, the district court found no fatal flaws in the petition or its service and reserved ruling on the constitutionality of the Act and the argument that the State was estopped by virtue of the plea agreement. The district court concluded that there was probable cause to believe that Hendricks is a sexually violent predator as defined in the Act and that he should be evaluated at Larned State Security Hospital to determine if he is.

Upon advice of counsel, Hendricks did not participate in the evaluation at the state hospital. As a result, the first report issued by the hospital was based on available records and behavioral observations during his stay. After ruling that the nature of the Act is civil rather than criminal or quasi-criminal so that the privilege against self-incrimination does not apply, the district court granted the State's request for an order compelling discovery. The district court ordered another evaluation and ordered Hendricks to cooperate in it.

A jury trial was conducted October 3-5, 1994. Hendricks was called as a witness by the State. He testified that he was 60 years old, that his history of sexual involvement with children began with his exposing himself to two girls in 1955, and that he had spent approximately half the time since then in prison or in psychiatric institutions. He explained that when he gets "stressed out," he is unable to control the urge to engage in sexual activity with a child. Hendricks agreed that he is a pedophile and that he is not cured of the condition.

The State also called Charles Befort, the chief psychologist at Larned State Hospital. He testified that a personality disorder consists of traits or characteristics which tend to produce in most situations predictable but unacceptable or abnormal behavior. He testified that a pedophile is predisposed to commit sexual acts with children and that pedophilia in and of itself is not considered to be a personality disorder. Dr. Befort testified that during the previous week he had performed an

evaluation of Hendricks. Dr. Befort believed it likely that Hendricks would engage in predatory acts of sexual violence or sexual activity with children if permitted to do so. The factors upon which he based this opinion were the aphorism that "behavior is a good predictor of future behavior," his professional knowledge that pedophiles tend to repeat their behavior, and Hendricks' poor understanding of his behavior. He testified that he did not believe Hendricks was mentally ill or had a personality disorder but that, as he interpreted the Act, pedophilia was a mental abnormality. He agreed that his interpretation of the statute was open to debate.

William Logan, a forensic psychiatrist, testified on behalf of Hendricks. He testified about re-offense rates for sex offenders, as shown by various studies. Re-offense rates for persons who had received treatment ranged from 3 to 37 $^1/_2$ percent; for untreated persons the range was 10 to 40 percent. Dr. Logan expressed the opinion that, based on current knowledge, "a psychiatrist or psychologist cannot predict whether an individual is more likely than not to engage in a future act of sexual predation."

The jury found that Hendricks is a sexually violent predator. He was committed to the custody of the Secretary of Social and Rehabilitation Services (SRS). Hendricks filed a motion to dismiss or, in the alternative, for a new trial which was based in part on evidence that apart from the regular staff of Larned State Hospital, professionals specifically dedicated to a treatment program for sexually violent predators were not available at the hospital. Although it had negotiated with two bidders who proposed to provide care and treatment under the Act, as of October 20, 1994, SRS had not entered into a contract with either. The motion was denied, and the district court ordered that Hendricks be transported to Larned State Security Hospital.

The Act is a product of the 1994 legislative session. It is patterned on a very similar statutory scheme enacted in the state of Washington in 1990. Wash. Rev. Code § 71.09.010 *et seq.* (1992). A divided Washington Supreme Court held that that state's Act was constitutional in *Personal Restraint of Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993). Thereafter, the United States District Court for the Western District of

Washington disagreed with the Washington Supreme Court and granted Young's petition for writ of habeas corpus. *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995). The district court concluded that the Washington act "violates the substantive due process component of the Fourteenth Amendment, the Ex Post Facto Clause, and the Double Jeopardy Clause." *Young*, 898 F. Supp. at 754. We will revisit these cases later in this opinion.

The legislature's stated reasons for enacting a comprehensive scheme for commitment of sexually violent predators appear in K.S.A. 59-29a01:

> "The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under K.S.A. 59-2901 et seq. and amendments thereto, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the

treatment needs of this population are very long term and the treatment modalities for this population are very different [from] the traditional treatment modalities for people appropriate for commitment under the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature."

This section is virtually identical to Wash. Rev. Code § 71.09.010 (1992).

In K.S.A. 59-29a02, terms are defined as they are used in the Act. The following are relevant to our determination:

"(a) 'Sexually violent predator' means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.

"(b) 'Mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

. . . .

"(e) 'Sexually violent offense' means:

. . . .

(2) indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto."

The legislature apparently anticipated that the principal use of the commitment procedure would follow incarceration. K.S.A. 59-29a03 provides that 60 days before the anticipated release of a person who may meet the criteria of a sexually violent predator, the agency with authority over the release must notify the prosecutor in the county where the person was charged. K.S.A. 59-29a04 prescribes initiation of the commitment procedure:

> "When it appears that the person presently confined may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition, within 45 days of the date the prosecuting attorney received the written notice . . . alleging that the person is a sexually violent predator and stating sufficient facts to support such allegation."

In the next step, a judge determines whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If so, the person is transferred to an appropriate facility for a professional evaluation. K.S.A. 59-29a05.

K.S.A. 59-29a06 provides that "[w]ithin 45 days after the filing of a petition . . . the court shall conduct a trial to determine whether the person is a sexually violent predator." It further provides that the person is entitled to counsel and professionals "to perform an examination [on] such person's behalf." Last, it provides that trial will be to the court in the absence of a jury demand, but that a written jury demand filed at least 4 days before trial by petitioner, respondent, or the judge will be honored. K.S.A. 59-29a07(a) provides that a determination that the person is a sexually violent predator must be made "beyond a reasonable doubt" or the person must be released. Where the court or jury is satisfied beyond a reasonable doubt that the person is a sexually violent predator,

"the person shall be committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care and treatment shall be provided at a facility operated by the department of social and rehabilitation services." K.S.A. 59-29a07(a).

K.S.A. 59-29a08 requires an annual "examination of the person's mental condition" and an annual court review of the status of the committed person for the purpose of determining whether "probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged." If so, the court will schedule a hearing at which the burden of proof "shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if released is likely to engage in acts of sexual violence."

Another means of release is set out in K.S.A. 59-29a10:

"If the secretary of the department of social and rehabilitation services determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released, the secretary shall authorize the person to petition the court for release. . . . The hearing shall be before a jury if demanded by either the petitioner or the county or district attorney or attorney general."

The burden of proof is the same as it would be at a hearing on an annual review. K.S.A. 59-29a10. The committed person may file a petition seeking release at any time, but

broad restrictions apply to petitioning for discharge without approval of the Secretary of SRS and make release through this avenue seem improbable. See K.S.A. 59-29a11.

K.S.A. 59-29a13 provides that "prior to the release of a person committed under this act, the secretary of the department of social and rehabilitation services shall give written notice of such release to any victim of the person's activities or crime."

Hendricks challenges the constitutionality of the Act on various grounds, alleging the Act violates both the United States and Kansas Constitutions. He argues the Act violates the prohibition against double jeopardy and ex post facto laws, fails to provide equal protection and procedural or substantive due process, and is void as overly broad and vague.

We first consider Hendricks' substantive due process challenge. In so doing, we must presume the Act is constitutional and resolve all doubts in favor of the Act's validity. If there is any reasonable way to construe the Act as constitutionally valid, we must do so. The Act must clearly violate the Constitution before it may be struck down. See *Sedlak v. Dick*, 256 Kan. 779, 793, 887 P.2d 1119 (1995); *Chiles v. State*, 254 Kan. 888, 897, 869 P.2d 707, *cert. denied* 130 L. Ed. 2d 88 (1994); *Boatright v. Kansas Racing Comm'n*, 251 Kan. 240, 243, 834 P.2d 368 (1992). The burden of proof is on the party challenging the constitutionality of the Act.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits a State's depriving any person of liberty "without due process of law." It "contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 125, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990).

Hendricks contends that his substantive due process liberty interest is violated by indefinite confinement under K.S.A. 59-29a01 *et seq.* He relies on *Foucha v. Louisiana*, 504 U.S. 71, 118 L. Ed. 2d 437, 112 S. Ct. 1780 (1992). He represents the case as

holding that due process prohibits a person's being involuntarily committed by a civil proceeding absent a finding that the person is both mentally ill and dangerous. It is his contention that the Act's requirement of a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence falls short of a finding of mental illness. He points out that "[t]he express purpose of the statutory scheme . . . is to confine persons 'who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons . . . .' K.S.A. 59-29a01."

As a criminal defendant charged with aggravated burglary and illegal discharge of a firearm, Foucha, in 1984, had been found by a Louisiana trial court not guilty by reason of insanity. Under Louisiana law he was committed to a psychiatric hospital, whether or not he was then insane, absent proof that he was not dangerous. Release under the Louisiana law depended on proof by Foucha that he was not dangerous. In the United States Supreme Court it was Foucha's contention "that this scheme denies him due process and equal protection because it allows a person acquitted by reason of insanity to be committed to a mental institution until he is able to demonstrate that he is not dangerous to himself and others, even though he does not suffer from any mental illness." 504 U.S. at 73.

In 1988, the superintendent of the facility in which Foucha was confined recommended that he be discharged or released. A three-member panel recommended that he be conditionally discharged. The two doctors appointed by the trial judge as a "sanity commission" agreed that Foucha's psychosis probably had been drug-induced, that he had recovered from that temporary condition, and that he showed no signs of psychosis or neurosis, but that he has "an antisocial personality, a condition that is not a mental disease and that is untreatable." 504 U.S. at 74. Thus, the doctors declined to certify that Foucha would not be a danger to himself or others. His confinement, therefore, was continued.

The Supreme Court's analysis began with *Addington v. Texas*, 441 U.S. 418, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979), in which it was

> "held that to commit an individual to a mental institution in a civil proceeding, the State is required by the Due Process Clause to prove by clear and convincing evidence the two statutory preconditions to commitment: that the person sought to be committed is mentally ill and that he requires hospitalization for his own welfare and protection of others." *Foucha*, 504 U.S. at 75-76.

A person who has been found not guilty of a criminal offense by reason of insanity, however, may be committed by a State "without satisfying the *Addington* burden with respect to mental illness and dangerousness." 504 U.S. at 76, citing *Jones v. United States*, 463 U.S. 354, 363, 77 L. Ed. 2d 694, 103 S. Ct. 3043 (1983), where the Supreme Court reasoned that guilt by reason of insanity established that (1) because of mental illness, (2) the defendant committed an act which constituted a criminal offense. Therefore, the *Foucha* Court held, it "could be properly inferred that at the time of the verdict, the defendant was still mentally ill and dangerous and hence could be committed." 504 U.S. at 76. Under the Constitution, confinement could continue until the person regained his sanity or no longer presented a danger to himself or others. See 504 U.S. at 77-78; *Jones*, 463 U.S. at 368.

Foucha had regained his sanity; the basis for confining him as a defendant who was not guilty by reason of insanity no longer existed. The State perpetuated his confinement on the basis of his potentially being dangerous due to his antisocial personality. The Supreme Court concluded that Foucha's liberty interest in being freed from indefinite confinement in a mental facility could not be defeated on that basis.

In distinguishing *United States v. Salerno*, 481 U.S. 739, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987), the Supreme Court emphasized the strict limitations of pretrial

detention of persons who pose a danger. *Foucha*, 504 U.S. at 82. In this context the Court stated:

> "Here, in contrast, the State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. *The same would be true of any convicted criminal, even though he has completed his prison term.* It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law." (Emphasis added.) 504 U.S. at 82-83.

The Washington Supreme Court found that Washington's sexual predator statute conformed to the due process standard of *Addington* and *Foucha*--clear and convincing proof of mental illness and dangerousness. *Personal Restraint of Young*, 122 Wash. 2d 1, 27, 857 P.2d 989 (1993). The requirement that commitment be predicated on dangerousness is said to be satisfied under the definition of sexually violent predator. Wash. Rev. Code § 71.09.020(1) (1992) defines a sexually violent predator as a person "likely to engage in predatory acts of sexual violence."

With regard to the requirement of mental illness, the court reasoned that the terms "mental abnormality," "mental disorder," and "mental illness" "are largely synonymous." 122 Wash. 2d at 27 n.3. Thus, the reasoning continues, by defining a sexually violent predator as a person who suffers from a mental abnormality or personality disorder, the requirement is satisfied. At the heart of the court's reasoning is

a selective and inconsistent use of the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d ed. rev. 1987) (hereafter cited as DSM-III-R). On the one hand, the court reasons that because "anti-social personality disorder" is defined in the DSM-III-R, it is a mental disorder, 122 Wash. 2d at 30, and on the other hand, that "mental abnormality" is a mental disorder, notwithstanding that it is not defined as such in the DSM-III-R. Simply stated, mental illness means whatever the Washington court says it means; it is this reasoning which was the basis for the court's conclusion that the Washington act did not conflict with *Foucha*.

The apparent inconsistency with Foucha's having an antisocial personality *rather than* being mentally ill was at first glossed over by the Washington majority, which noted that Young suffered from an antisocial personality disorder, which "is classified as a mental disorder in the *DSM-III-R*." 122 Wash. 2d at 30. In a subsequent footnote, the majority offered the following justification:

> "Petitioners raise the issue that, under *Foucha*, it is impermissible to civilly commit someone who has an 'antisocial personality,' because that condition is not a mental disorder. According to petitioners, the sex predator Statute violates this holding. This argument belies a careless reading of the *Foucha* facts. First, the condition in *Foucha* was an 'antisocial personality.' This condition falls within the *DSM-III-R* section entitled 'V Codes for Conditions Not Attributable to a Mental Disorder' and is formally designated 'antisocial behavior'; it is not a mental disorder. As such, anti-social behavior cannot form the basis for civil commitment. *Foucha v. Louisiana* (112 S. Ct. 1780). The sex predator Statute, however, requires proof of a 'personality *disorder*' as one of the alternative means of commitment. (Italics ours.) RCW 71.09.020. Unlike 'antisocial behavior,' an 'antisocial personality disorder ' is a recognized mental disorder which is defined in the *DSM-III-R*, at 342."

Young, 122 Wash. 2d at 37 n.12.

The Washington court's dissenters disputed this rationale. Their precept was that "the Statute . . . fails to meet the mental illness requirement." 122 Wash. 2d at 61. Thus, "[l]ike the statute in *Foucha*, [the Washington statute] violates substantive due process because it requires only dangerousness and not mental illness as a prerequisite to commitment." 122 Wash. 2d at 63. It was suggested in the dissenting opinion that the majority indulged in "psychiatric incantations." 122 Wash. 2d at 65. The dissenting justices warned that "by authorizing the indefinite confinement in mental facilities of persons who are not mentally ill, the Statute threatens not only the liberty of certain sex offenders, but the liberty of us all." 122 Wash. 2d at 60. The dissenting justices recognized the insidious effect of sanctioning the separation of the commitment of sexually violent predators from the statutory procedure for the commitment of the mentally ill. Once that is accomplished, the same reasoning could be applied to anyone who commits any designated offense and is labeled "mentally abnormal" or suffering from an "anti-social personality disorder."

Foucha also was a focus for the federal district court in *Young*, which agreed with the dissenting Washington justices that there is no mental illness requirement in the statute. 898 F. Supp. at 749. The district court noted:

> "The absence of a mental illness requirement is apparent both in the statutory language and in its legislative history. First, the legislature's findings expressly disavow the notion that the targeted group of persons are mentally ill. As explained in Wash. Rev. Code § 71.09.010, the target group is made up of individuals 'who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act.' Unlike persons with serious mental disorders, the legislature concluded, sexual predators 'have antisocial personality features which are unamenable to existing mental

illness treatment modalities,' and for which the prognosis of cure is poor." 898 F. Supp. at 749.

After examining the statutory language and legislative history, the district court concluded

> "that the Sexually Violent Predator Statute, allowing as it does the indefinite confinement of persons who are not mentally ill, violates the substantive protections of the Due Process Clause. Predictions of dangerousness alone are an insufficient basis to continue indefinitely the incarceration of offenders who have completed their prison terms." 898 F. Supp. at 751.

It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under K.S.A. 59-2901 *et seq.* If there is nothing to treat under 59-2901, then there is no mental illness. In that light, the provisions of the Act for treatment appear somewhat disingenuous. The federal district court in *Young* observed:

> "The Statute forecloses the possibility that offenders will be evaluated and treated until after they have been punished. Of course, it defies reason to suggest that the mental abnormalities or personality disorders causing violent sexual predation surface only at the termination of a prison term. Common sense suggests that such mental conditions, if they are indeed the cause of sexual violence, are present at the time the offense is committed. Setting aside the question of whether a prison term exacerbates or minimizes the mental condition of a sex offender,

> it plainly delays the treatment that must constitutionally accompany commitment pursuant to the Statute. The failure of the Statute to provide for examination or treatment prior to the completion of the punishment phase strongly suggests that treatment is of secondary, rather than primary, concern." 898 F. Supp. at 753.

It is clear that the primary objective of the Act is to continue incarceration and not to provide treatment. Protecting the public is a legitimate exercise of the State's police power. Although the Act is a well-intentioned attempt by the legislature to accomplish that objective, it cannot be done in a constitutionally impermissible manner. Having said that, we need to point out that the legislature has provided the State with other options to achieve that objective and, in addition, has the authority to increase the penalty for sex crimes committed against children.

The record indicates that Hendricks had at least three felony convictions prior to being charged in the present case. Under the Habitual Criminal Act, Hendricks' sentence could have been tripled. Also, Hendricks could have been sentenced to the maximum rather than the minimum sentence. Additionally, the sentences could have been ordered to run consecutively rather than concurrently. The State chose not to pursue any of these options. Instead, the State opted to enter into a plea bargain with Hendricks. The State agreed to dismiss one count, to recommend the statutory minimum sentence of 5 to 20 years, and to not seek imposition of the Habitual Criminal Act.

The State now chooses to pursue the option under the Act to continue Hendricks' incarceration. The State contends that commitment under the Act requires "a finding of mental illness and dangerousness . . . consistent with *Foucha*." The only authority cited by the State is a passage from *Young* in which the Washington Supreme Court addresses only the element of dangerousness, never mentioning mental illness.

We find no support in the Act that a finding of mental illness is required. As noted by the federal district court in *Young*, there is an absence of a mental illness requirement in the language of the Washington act. K.S.A. 59-29a01 states that sexually violent predators do not have a mental illness which "renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill person defined in K.S.A. 59-2901 et seq." The statute then contrasts sexually violent predators with "persons appropriate for civil commitment under K.S.A. 59-2901 et seq." in that they have "antisocial personality features which are unamenable to existing mental illness treatment modalities." By such language, the legislature recognizes that sexually violent predators are not mentally ill but, rather, have an "antisocial personality feature" or a "mental abnormality."

Hendricks takes the position that, on the record in this case, the reasoning employed by the Washington court in upholding the constitutionality of its statute has no support. In other words, the record in this case will not support a finding that the statutory requirement of a mental abnormality or a personality disorder is equivalent to the constitutional standard of mental illness. We agree.

The State's principal evidence concerning Hendricks' mental state was the testimony of Charles Befort, the chief psychologist at Larned State Security Hospital. He testified that he did not believe Hendricks was mentally ill or had a personality disorder. Dr. Befort described a person with a personality disorder as

> "an individual who has a set of characteristics or traits that are enduring; that is, traits or characteristics that tend to result in their behaving in fairly standard predictable ways through most situations. Now, we all have those things, those traits and characteristics. It becomes a disorder when those traits and characteristics result in the person behaving or thinking, perhaps, or otherwise acting in such a way that it causes them trouble, causes society trouble, is considered abnormal, then it

becomes a disorder."

Dr. Befort testified that an example of a personality disorder is antisocial personality. He described persons with antisocial personalities as

> "individuals who have disregard for social expectations, social values, social norms. Their behavior indicates that disrespect or unconcern about staying within acceptable boundaries of behavior. Usually these behaviors include disregard for others' rights. They may exploit other people to those persons' detriment. In the worst cases, of course, they turn to crime, criminal behavior. In non-criminal things, they tend to be untrustworthy. They're egocentric, those types of things."

He testified that pedophilia is not considered a personality disorder but is considered a mental abnormality. As already noted, in Dr. Befort's opinion, Hendricks does not have a personality disorder. Personality disorder is not defined in the Act.

With regard to the term "mental abnormality," Dr. Befort said that it is a phrase used by clinicians to discuss abnormality or deviance, but that it is not a diagnosis. The term is not defined in DSM-III-R. It therefore could not be used appropriately in a formal diagnosis. "Mental abnormality" is not a psychiatric or medical term but, rather, a legal term defined in the Act. K.S.A. 59-29a02(b) provides: "'Mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." Dr. Befort testified that this definition is circular in that certain behavior defines the condition which is used to predict the behavior. In a similar regard, the federal district court in *Young* stated that in the Washington statute's use of "personality disorder," "the only observed characteristic of the disorder is the predisposition to commit sex crimes." 898 F. Supp. at 750.

We must determine if Hendricks is denied substantive due process based not on his lack of character but, rather, on the merits of his challenge. Mental illness is defined in K.S.A. 59-2902(h) as meaning any person who: "(1) [i]s suffering from a severe mental disorder to the extent that such person is in need of treatment; (2) lacks capacity to make an informed decision concerning treatment; and (3) is likely to cause harm to self or others." Here, neither the language of the Act nor the State's evidence supports a finding that "mental abnormality or personality disorder," as used in 59-29a02(a), is a "mental illness" as defined in 59-2902(h). Absent such a finding, the Act does not satisfy the constitutional standard set out in *Addington* and *Foucha*. Justice White, speaking for the majority of the United States Supreme Court in *Foucha*, clearly stated that to indefinitely confine as dangerous one who has a personality disorder or antisocial personality but is not mentally ill is constitutionally impermissible. 504 U.S. at 78. Similarly, to indefinitely confine as dangerous one who has a mental abnormality is constitutionally impermissible.

In addition, the State's own evidence is that Hendricks was being committed even though he does not suffer from mental illness. Hendricks is not mentally ill, and the criminal offenses for which he was imprisoned were not the result of mental illness. Therefore, as applied to Hendricks, the constitutionality of the Act depends upon a showing of dangerousness without a finding of mental illness. Clearly, the due process standard of *Addington* and *Foucha* is not met by the Act as applied to Hendricks. We conclude that the Act violates Hendricks' substantive due process rights.

We hold that the Kansas Sexually Violent Predator Act, K.S.A. 59-29a01 *et seq.*, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Having so held, we need not consider the other issues raised by Hendricks in this appeal. We note that the dissenters have chosen to consider and decide those issues, notwithstanding that they have not been addressed or decided by the majority. That part of the dissent is dicta and for that reason does not warrant a response.

The judgment of the district court is reversed.

LOCKETT, J., concurring: This case illustrates better than most that the process of judicial decision is often difficult to exercise. The hard fact is that sometimes we make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution as we see them compels the result.

Our colleagues in dissent advance powerful public policy arguments as to why the Kansas Sexually Violent Predators Act (Act) should be found not to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. With all due respect to those views, I do not believe that the Constitution gives us the right to rule as the dissenting members of the court urge. In this concurring opinion, I will set out my reasoning for joining Justice Allegrucci's majority opinion.

The dissent disagrees with the basic premise, the underlying reasoning, and the decision of the majority that the Act violates the due process clause of the Fourteenth Amendment to the United States Constitution. The dissent bases its reasoning on the decisions of the Supreme Courts of Washington and Wisconsin "which are almost identical and substantially similar legislation in their respective states." The dissent failed to note that a United States District Court disagreed with the decision of the Washington Supreme Court and declared the similar Washington sexual violent predator act an unconstitutional violation of the Due Process, Ex Post Facto, and Double Jeopardy Clauses of the federal Constitution when the same offender later petitioned the district court for a writ of habeas corpus. *Young v. Weston*, 898 F. Supp. 744 (D. Wash. 1995).

The United States Constitution is our primary governing document. The Constitution permits the State to remove criminals and the mentally ill from society. Criminals and the mentally ill have separate rights under the Constitution. Under the Constitution, criminals have the rights of equal protection and due process and cannot be cruelly or unusually punished or punished twice for the same crime. The mentally

ill have the rights of equal protection and due process and cannot be punished for being mentally ill.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that before an individual may be involuntarily committed for control, care, and treatment, the State must prove by clear and convincing evidence that the individual is both mentally ill and dangerous. Under our statutory law a mentally ill person is any person who: (1) is suffering from a severe mental disorder to the extent that such person is in need of treatment; (2) lacks capacity to make an informed decision concerning treatment; and (3) is likely to cause harm to self or others. K.S.A. 59-2902(h). Individuals who are mentally ill may be civilly committed. The State is required to treat these individuals while committed and release them when the statute no longer applies.

A criminal may be sentenced to imprisonment because he or she broke the law and is a danger to others. Some individuals who commit crimes have a personality disorder termed antisocial. An antisocial person is an individual who has disregard for social expectations, social values, and social norms. The person's behavior indicates a disrespect or unconcern about staying within acceptable boundaries of behavior. Usually the behavior includes disregard for others' rights. The antisocial person may exploit another to that person's detriment. In the worst cases, the individual turns to crime.

Leroy Hendricks has an antisocial personality. He is not mentally ill and could not be committed for treatment to protect society. Hendricks committed sex crimes against children. He was sentenced and imprisoned for those crimes. Without violating the Constitution, the State could have incarcerated Hendricks until he exhaled his last breath and his spirit departed this earth, but it did not. Hendricks has now served the criminal sentence imposed by the State and under the law must now be released, even if he has an antisocial personality.

In an effort to protect society from individuals, such as Hendricks, who are antisocial and will in all probability commit other sex crimes when released from prison, the Act was enacted. The Act reclassifies persons to be mentally ill who are antisocial, a danger to others, and have been convicted of a specific sex crime. The effect is that the criminal is reclassified as a mentally ill person. The Act permits the State to civilly commit the criminal for treatment as a mentally ill person because of a past criminal act and the fact that the individual has an antisocial personality.

The purpose of having a federal Constitution is to insure equal justice nationwide. In any action where there is a question regarding the United States Constitution, state courts have the power to determine whether the act or action violates the United States Constitution. State courts cannot disregard prior decisions of the United States Supreme Court which interpret the United States Constitution.

The United States Supreme Court in *Foucha v. Louisiana*, 504 U.S. 71, 118 L. Ed. 2d 437, 112 S. Ct. 1780 (1992), noted that to commit an individual to a mental institution in a civil proceeding, the State is required by the Due Process Clause to prove by clear and convincing evidence the two statutory preconditions to commitment: The person sought to be committed is mentally ill, and the person requires hospitalization for his or her own welfare and the protection of others.

The State of Louisiana asserted that because an individual, like Hendricks here, once committed a criminal act and now has an antisocial personality which sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, the individual may be held indefinitely as being mentally ill. The United States Supreme Court stated that rationale would permit the State to hold indefinitely any other insanity acquittee, not only the mentally ill, who could be shown to have a personality disorder which may lead to criminal conduct. It noted that the same would be true of any convicted criminal, even though the person has completed his or her prison term. The *Foucha* Court pointed out that it would also be only a step away from substituting confinements for dangerousness for our present system which, with only

narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law. The Supreme Court held that a convicted criminal, such as Hendricks, may not be held as a mentally ill person because of criminal dangerousness.

Because the Washington act, which is almost identical and substantially similar legislation to the Kansas act, was declared unconstitutional by the federal court, and the reasoning of the majority follows the prior decisions of the Supreme Court of the United States, I must join the majority.

In this instance we may not be the court of last resort. Under the rules of the United States Supreme Court, the State may seek a writ of certiorari, and that Court has the power to make the final determination.

LARSON, J., dissenting: I disagree with the basic premise, the underlying reasoning, and the conclusion of the majority that the Kansas Sexually Violent Predator Act (the Act) K.S.A. 59-29a01 *et seq.* violates the substantive aspect of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Kansas should join the decisions of the Supreme Courts of Washington (*Personal Restraint of Young*, 122 Wash. 2d 1, 857 P.2d 989 [1993]) and Wisconsin (*State v. Post*, 197 Wis. 2d 279, 541 N.W. 115 [1995]; *State v. Carpenter*, 197 Wis. 2d 252, 541 N.W. 105 [1995]) in upholding the validity of almost identical and substantially similar legislation in their respective states.

I would affirm the jury's finding that Leroy Hendricks is a sexually violent predator requiring care and treatment by the Secretary of Social and Rehabilitation Services (SRS) of the State of Kansas. In my analysis, I will first consider the Act, more closely examine the evidence, set forth my specific disagreements with the majority holding, then briefly show why the multiple claims of invalidity of the Act should fail and the decision of the trial court should be affirmed.

History and provisions of the Kansas Sexually Violent Predator Act, K.S.A. 59-29a01 et seq.

The issues raised in this appeal require the interpretation of the Act. The interpretation of a statute is a question of law over which our review is unlimited. *State v. Donlay*, 253 Kan. 132, Syl. ¶ 1, 853 P.2d 680 (1993). We begin the process by reviewing the history and provisions of the Act.

The 1994 Kansas Legislature, in response to the urging of an Ad Hoc Sexual Offender Task Force given impetus by the parents of Stephanie Schmidt (see *State v. Gideon*, 257 Kan. 591, 894 P.2d 850 [1995]), proposed, debated, and passed S.B. 525. Senator Bob Vancrum, before the Senate Judiciary Committee on February 22, 1994, stated it was designed "to protect our communities from those offenders who pose the greatest danger to society by providing for treatment and commitment of sexually violent predators until they are no longer a danger."

Senator Vancrum further said: "The bill is narrowly tailored to focus on the smaller number of habitual sex offenders who, because of their psychological makeup, pose an immediate danger to the public as soon as they are released from prison."

The debate prior to the bill's passage was intensified by law enforcement officials' statements of frustration at knowing that a soon-to-be-released sexual offender was likely to victimize another woman or child, testimony of Special Assistant Attorney General (now Attorney General) Carla J. Stovall to the House Judiciary Committee, March 21, 1994; and the emotional statement of a grieving father, Gene Schmidt, to the House Judiciary Committee, March 21, 1994. The debate included the measured concerns of Kelly McCaffrey, a private citizen, to the same House Judiciary Committee on March 21, 1994, who stated:

> "Inevitably, several terms and definitions used in SB 525 will be a source of great consternation for some opponents of the bill,

particularly those on the field of psychiatry. Such terms include 'sexual violent predator,' 'mental abnormality,' and 'personality disorder.' The argument is that such terms are merely legal, with no clinically significant meaning and no recognized diagnostic use."

McCaffrey went on to state that "'legal rules are a specialized form of language that must respond to the human experiences that gave rise to them in the first place. Yet, legal rules must also structure that response in a way that allows them to be applied consistently and reliably'" (quoting Rideout, *So What's in a Name? A Rhetorical Reading of Washington's Sexually Violent Predators Act*, 15 U. Puget Sound L. Rev. 781 [1992]).

The Act's first section, K.S.A. 59-29a01, clearly states the legislative findings:

"The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under K.S.A. 59-2901 et seq. and amendments thereto, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure

pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature."

With it apparent that the legislature intended the commitment to be civil, the Act provides the following definitions:

"(a) 'Sexually violent predator' means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person more likely to engage in the predatory acts of sexual violence.

"(b) 'Mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.

"(c) 'Predatory' means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.

"(d) "Sexually motivated' means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification." K.S.A. 59-29a02.

From the definitions, it is clear that before there can be a finding that a person is a sexually violent predator there must have been a prior charge or conviction of a sexually violent offense; the anticipated sexually violent acts must be directed against strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization; and the person must have a congenital or acquired mental condition affecting emotional or volitional capacity sufficient to predispose the commission of such predatory sexually violent acts. Nowhere is there any requirement that this "sexually violent predator" must be "mentally ill" as defined in K.S.A. 59-2902(h), although a person subject to the Act could hardly be considered to be mentally healthy.

A "sexually violent offense" is both strictly and expansively defined as (1) rape, (2) indecent liberties with a child, (3) aggravated indecent liberties with a child, (4) criminal sodomy, (5) aggravated criminal sodomy, (6) indecent solicitation of a child, (7) aggravated indecent solicitation of a child, (8) sexual exploitation of a child, (9) aggravated sexual battery, (10) comparable federal or state crimes, (11) attempts, conspiracies, or criminal solicitations of the above crimes, and (12) "any act which either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated." K.S.A. 59-29a02.

With this definitional background, I turn to the procedure for determining if a person is a sexually violent predator. The Act provides for written notice of anticipated release from incarceration, K.S.A. 59-29a03, the filing of a petition alleging that a person is a sexually violent predator, K.S.A. 59-29a04, and a judicial

determination of whether there is probable cause to believe the person named in the petition is a sexually violent predator, K.S.A. 59-29a05.

The Act then requires the determination that a person is a sexually violent predator to be made by a court or jury. It provides for counsel to be appointed for the alleged sexually violent predator if the person is indigent, and the right to retain qualified experts or professional persons for assistance. K.S.A. 59-29a06.

The determination that a person is a sexually violent predator must be beyond a reasonable doubt by the court or by a unanimous jury, if one is requested. K.S.A. 59-29a07. (The beyond a reasonable doubt standard is materially more stringent than the "clear and convincing" standard of proof held to be required in state involuntary commitment proceedings by Fourteenth Amendment due process. *Addington v. Texas*, 441 U.S. 418, 60 L. Ed. 2d 323, 99 S. Ct. 1804 [1979]).

If the person is determined to be a sexually violent predator, the commitment is to the Secretary of SRS "for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." K.S.A. 59-29a07. The right of appeal is clearly stated, as is the procedure to be followed if a person charged with a sexually violent offense and found to be incompetent to stand trial is about to be released under K.S.A. 22-3305. K.S.A. 59-29a07(b).

The Act provides for yearly examinations of the person's mental condition, an annual court review, the right to petition for release, a hearing on the petition before a court or a jury, and the continued obligation of the State to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that upon discharge, he or she is likely to commit predatory acts of sexual violence. K.S.A. 59-29a10. The provisions of K.S.A. 59-29a09 specifically require that "[t]he involuntary detention or

commitment of persons under this act shall conform to constitutional requirements for care and treatment."

Factual Statement

Although the legal issues in this case are numerous and complicated, it basically involves a factual finding by a unanimous jury that beyond a reasonable doubt Leroy Hendricks is a sexually violent predator. To place this finding in its proper perspective, a detailed recitation of the facts presented to the jury must be considered.

Hendricks testified he is 60 years old and first exhibited unlawful sexual behavior when he was 20 years old in 1955 by exposing his genitals to two young girls. He was charged with and pled guilty to indecent exposure. In 1957 he was convicted of lewdness for playing strip poker with a teenage girl.

His sexual desire for children continued. In 1960 he molested two young boys while he worked for a carnival. This resulted in imprisonment for 3 years. Soon after he was paroled in 1963, he was arrested for molesting a 7-year-old girl and again imprisoned. Attempts were made to treat him for sexual deviance, and in 1965 he was considered to be "safe to be at large" and discharged from a hospital.

Several years later, Hendricks engaged in sex with another young boy and girl. He was again imprisoned in 1967. He refused to participate in additional sexual offender treatment and remained incarcerated until he was paroled in 1972. He had been diagnosed as a pedophile; entered into and then quit treatment; and shortly thereafter began molesting his stepdaughter and stepson. He was incarcerated in 1984 for indecent liberties and was serving that sentence when he reached his conditional release date in September 1994, which resulted in these proceedings.

It is clear that Hendricks spent roughly half of his life between the ages of 20 to 60 incarcerated and had perpetrated sexual acts against children during every period

when he was not in jail. He acknowledged that to relieve stress, he would molest children and that he hoped he would not do so again, but the only way to guarantee that he would not was for him to die. He acknowledged telling Dr. Charles Befort, a psychologist at Larned State Security Hospital, that "treatment was bullshit."

One of the girls Hendricks exposed himself to in 1955 testified to the incident. Hendricks' stepdaughter and stepson testified as to repeated, long-term sexual abuse during their youth.

Lester Lee, a licensed clinical social worker specializing in male sexual offender treatment, testified Hendricks had a diagnosis of personality trait disturbance, passive-aggressive personality, and pedophilia.

Dr. Charles Befort testified as to his conversations with and testing of Hendricks. Dr. Befort stated that a personality disorder is a set of characteristics or traits, causing predictable behavior, which becomes a disorder when the person behaves in an abnormal manner, causing them or society trouble. He explained that ordinarily a mental abnormality is not a formal diagnosis but is a clinical phrase to discuss abnormality or deviance.

Dr. Befort testified he considered pedophilia to be a mental abnormality but that it was not necessarily a personality disorder. He did not diagnose Hendricks as having a personality disorder, nor did he find that he was "mentally ill" as the term is used in connection with commitments. Dr. Befort did opine, without objection, that Hendricks was a pedophile who was likely to engage in predatory acts of sexual violence or sexual activity with children if permitted.

Dr. Befort's testimony was based on Hendricks' interviews, his testing, and his activity prior to his last incarceration in 1984. He admitted on cross-examination that the term mental abnormality was not defined anywhere in the Diagnostic and Statistical Manual of Mental Disorders (3d ed. rev. 1987 and 4th ed. rev. 1995) published

by the American Psychiatric Association (hereafter cited as DSM-IV), that the causes of behavior are multi-dimensional, and that "likely to" means a more than 50 percent chance that the person will engage in predatory acts of sexual violence at some point in the future. Dr. Befort reiterated on cross-examination that it was his opinion that Hendricks was a sexually violent predator as defined by the statute.

Hendricks testified briefly on his own behalf that he was divorced and had no intention of reestablishing a relationship with his former wife. Hendricks' principal witness was Dr. William S. Logan, a forensic psychiatrist, who, after qualifying outside the presence of the jury, expressed an opinion based on a reasonable degree of medical certainty that psychologists and psychiatrists are not able to predict with more than 50 percent accuracy the future dangerousness of a sex offender. He further opined that the reliability of such a prediction of dangerousness or re-offense of sex offenders would be less than 50 percent accurate.

Based on this testimony, the jury was instructed, without objection on appeal, and a unanimous finding was reached that Hendricks was a sexually violent predator.

Substantive Due Process

It is instructive to begin an analysis of this issue with a recitation of the rules for evaluating the constitutionality of a statute, although the importance of these presumptions becomes diminished as we weigh the ultimate balance in reaching our conclusions.

> "Long-standing and well-established rules are that the constitutionality of a statute is presumed, that all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the Constitution. Moreover, it is the duty of the court to uphold the statute under attack, whenever possible, rather than defeat it,

and if there is any reasonable way to construe the statute as constitutionally sound, that should be done." *U.S.D. No. 503 v. McKinney*, 236 Kan. 224, 230, 689 P.2d 860 (1984).

In fact, the authority and duty of the court to construe a statute as constitutional if it can be done within the legislature's apparent intent is so strong that the court may read necessary judicial requirements into the statute. *State v. Durant*, 244 Kan. 522, Syl. ¶ 10, 769 P.2d 1174, *cert. denied* 492 U.S. 923 (1989).

The use of substantive due process to invalidate a statute is particularly suspect:

> "'Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments. This is . . . only to outline Mr. Justice Black's constant reminder to his colleagues that the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable.' *Moore v. East Cleveland*, 431 U.S. 494, 543-544 (1977) (WHITE, J., dissenting)." *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225-26, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985).

The opinion of this court relies on substantive due process to declare the Act unconstitutional. However, the majority fails to address directly what test should be used to measure the constitutionality of a legislative act attacked on the basis of substantive due process. Compare *Personal Restraint of Young*, 122 Wash. 2d at 26; *State v. Post*, 197 Wis. 2d 279, 301, 541 N.W. 115 (1995). It appears to assume that if

substantive due process is implicated, the legislative act is *ipso facto* unconstitutional. Such a conclusion should not be so easily reached.

Where no fundamental right is involved, a statute attacked as violative of due process is subject to only minimal scrutiny:

> "If a statute is attacked as violating due process, the test is whether the legislative means selected have real and substantial relation to the objective sought. This rule has been restated in terms of whether the statute is reasonable in relation to its subject and is adopted in the interests of the community." *Cott v. Peppermint Twist Mgt. Co.*, 253 Kan. 452, Syl. ¶ 18, 856 P.2d 906 (1993).

This standard is functionally equivalent to the rational basis test in the context of equal protection challenges. *In re Wood*, 866 F.2d 1367 (11th Cir. 1989). "Under the 'rational basis' test, if there is any rational relationship between the act and a legitimate governmental objective, the act passes muster. Under this test one challenging the constitutionality of the act bears the burden of showing no rational relationship exists between the means and the end." *State v. Risjord*, 249 Kan. 497, 501-02, 819 P.2d 638 (1991).

However, the standard is heightened where a fundamental right is involved. We held in *Farley v. Engelken*, 241 Kan. 663, 669, 740 P.2d 1058 (1987), that the "standard of scrutiny increases with the perceived importance of the right or interest involved and the sensitivity of the classification."

> "The most critical level of analysis is 'strict scrutiny,' which applies in cases involving 'suspect classifications such as race, ancestry, and alienage, *and fundamental rights expressly or implicitly guaranteed by the Constitution.' Farley*, 241 Kan. at

669. When applying the strict scrutiny test, the burden is placed upon the State to show there is a compelling state interest in the statute, ordinance, or regulation; otherwise it is unconstitutional." (Emphasis added.) *State v. Risjord*, 249 Kan. at 501.

Thus, when considering whether a statute violates substantive due process, the first step in the analysis is to determine whether it involves a fundamental right. If it does not, a rational basis for the enactment will be sufficient to allow it to pass constitutional muster. If a statute involves a fundamental right, the statute is then subject to strict scrutiny.

This is important because of the burden-shifting nature of strict scrutiny. When the statute, ordinance, or regulation is subject to strict scrutiny, the burden has been placed on the State to show the required compelling State interest for its action and the presumption of constitutional validity becomes greatly diminished. See *State ex rel. v. Schneider v. Liggett*, 223 Kan. 610, 617, 576 P.2d 221 (1978). *But*, it does not automatically follow that the challenged statute, ordinance, or regulation is unconstitutional.

The United States Supreme Court has recently reiterated that application of strict scrutiny prescribes only the test to be applied and not the result which is to be reached. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. __, 132 L. Ed. 2d 158, 188, 115 S. Ct. 2907 (1995) ("We wish to dispel the myth that strict scrutiny is 'strict in theory, but fatal in fact.'"). If the government action is "narrowly tailored" to the compelling interest of the State, it survives the strict scrutiny analysis.

There is no doubt that the civil commitment of sexually violent predators involves so significant a deprivation of liberty that the protections of due process are invoked. See *Foucha v. Louisiana*, 504 U.S. 71, 80, 118 L. Ed. 2d 437, 112 S. Ct. 1780 (1992); *Addington v. Texas*, 441 U.S. at 425. This clearly requires that we apply the strict

scrutiny test and the analysis it involves. The question therefore becomes whether the State has shown a sufficiently compelling interest to warrant the statute's undeniable intrusion on Hendricks' liberty and whether the commitment scheme it has adopted is narrowly tailored to serve that compelling interest.

Unfortunately, the Supreme Court recently indicated in *Foucha* that our review might be somewhat less than strict scrutiny when it stated: "Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason, which it has not put forward for such discrimination against insanity acquittees who are no longer mentally ill." *Foucha*, 504 U.S. at 86. If the State were only required to have a "particularly convincing reason" for its action, it would be a less stringent test than that required by strict scrutiny. Considering the gravity of the deprivation of liberty imposed by the statute, such increased permissiveness is, in our view, inappropriate. Therefore, our analysis is based on a strict scrutiny test, beginning with the premise that the State of Kansas has a compelling interest both in treating sexually violent predators and in protecting society from their actions. See *Vitek v. Jones*, 445 U.S. 480, 495, 63 L. Ed. 2d 552, 100 S. Ct. 1254 (1980). The ultimate question then becomes whether the Act is sufficiently narrowly tailored to serve those interests without unduly burdening individual rights.

The majority opinion suggests that the balance has already been weighed in the United States Supreme Court in favor of Hendricks and that we are therefore bound to find the Act unconstitutional. A review of the available cases, however, illustrates that we write on a relatively clean slate on the precise issues before us, and the limited authority available suggests the Act is a legitimate exercise of the legislature's power.

Addington v. Texas, 441 U.S. 418, considered the question of whether procedural due process requires more than clear and convincing evidence in support of the State's burden before a person can be subject to involuntary civil commitment. The Court, in a unanimous decision, held that procedural due process required more than a

mere preponderance of evidence, but not evidence beyond a reasonable doubt. The clear and convincing standard of proof was therefore adopted as the constitutional minimum for involuntary civil commitment.

Addington offers some guidance in the present case, but is in no sense controlling. *Addington*, as a procedural due process case, was only indirectly concerned with the substance of Texas' involuntary civil commitment laws. *Addington* did not, therefore, deal with the question of what mental condition was required to justify involuntary commitment, but only considered how certain the proof of that mental condition had to be. However, the Court considered the degree of mental pathology required in terms of evaluating the risk of error of assessment under the various standards of proof it considered.

Chief Justice Burger, in writing for a unanimous court, cautioned:

> "At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered." 441 U.S. at 426-27.

Thus, *Addington* tells us little more than that one may not be involuntarily committed as mentally ill without "something more serious than is demonstrated by idiosyncratic behavior." What is that "something more"? *Addington* is unequivocal: That is a question reserved largely to the states. "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum." 441 U.S. at 431. The *Addington* Court seems to reason that the degree of proof required for involuntary commitment is inversely proportional to the severity of the ailment of the mind. See 441 U.S. at 430-33. Therefore, since our Act requires a higher degree of proof than the constitutional minimum, the Act appears to be "narrowly tailored" to restrict its application to contexts where the interests of the State are most compelling. From the dissimilar facts of *Addington*, little more guidance can be obtained.

Jones v. United States, 463 U.S. 354, 77 L. Ed. 2d 694, 103 S. Ct. 3043 (1983), also indirectly implies that the legislature had power to enact the Act. In *Jones*, the United States Supreme Court considered whether a determination of insanity at a criminal trial under a preponderance of the evidence standard was sufficient under the Due Process Clause to justify involuntary civil commitment without regard to the length of a hypothetical criminal sentence. Under the District of Columbia statute at issue, an insanity acquittee was to be confined in a mental hospital until he proved himself no longer mentally ill or dangerous. The Supreme Court found: "A verdict of not guilty by reason of insanity establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness." 463 U.S. at 363. It is critical to understand that in the District of Columbia a defendant's insanity is established by the *Durham* test, which excludes from punishment criminal conduct which is a product of a mental disease or defect. See *Durham v. United States*, 214 F.2d 862, 874-875 (D.D.C. 1954); *Bethea v. United States*, 365 A.2d 64, 69 n 11 (D.C. 1976). Not only did the Supreme Court find the *Durham* test sufficient to prove mental illness, it also found an insanity acquittal sufficient to support "an inference of

continuing mental illness. It comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment." *Jones*, 463 U.S. at 366.

Applied here, *Jones* makes clear that a requirement that a person suffer some mental infirmity before he or she can be involuntarily committed can be satisfied by more than a single, inflexible standard. For constitutional purposes, "mental illness" is not a psychiatric diagnosis to be made in accordance with the DSM-IV, but a legal determination to be made with reference to some standard that establishes that the person suffers a condition that is an ailment of the mind, rather than mere "idiosyncratic behavior" within a range of conduct that is generally acceptable. The United States Supreme Court has clearly decided not to imbue the term "mental illness" with any specific constitutional meaning, instead showing a preference for considering the meaning applied to the term by the statutory scheme at issue. See *O'Connor v. Donaldson*, 422 U.S. 563, 574-75, 45 L. Ed. 2d 396, 95 S. Ct. 2486 (1975).

This background brings into clearer focus the exact resolve of the Supreme Court in *Foucha v. Louisiana*, 504 U.S. 71. *Foucha* is a case on which the majority places great emphasis, although it is also highly dissimilar. *Foucha* dealt with the question of whether an insanity acquittee had to remain involuntarily committed even if mentally healthy (although choosing to be anti-social), if he failed to prove he was not dangerous. It is immediately apparent that *Foucha* is unlike the present case in the very areas that made the Louisiana statute in *Foucha* most offensive. First, under our Act there is no mechanism whereby a person can be confined while mentally healthy solely on the basis of supposed dangerousness. Second, under our Act the burden of proving an ailment of the mind and dangerousness remains always on the State, and always at the high burden of beyond a reasonable doubt.

The *Foucha* Court, without a majority opinion, found the Louisiana statute to be unconstitutional as violative of due process. The plurality opinion noted that due process required clear and convincing evidence of dangerousness and mental illness to

support involuntary civil commitment. 504 U.S. at 80. Interestingly, the Court relied on *Jones*, which had determined that the mental illness required for involuntary civil commitment could be established by a finding of insanity at a criminal trial, even though Louisiana did not use the *Durham* test but rather the *M'Naghten* test. 504 U.S. at 80; La. Rev. Stat. § 14:14 (West 1986). This further illustrates that the Court recognized that "mental illness" was not a diagnostic term of art but rather a descriptive term which could be satisfied by various standards. Further evidence of the Court's flexible interpretation of mental illness is found in the fact that it alternatively referred to mental "illness," "disease," and "insanity" without expansion or qualification. 504 U.S. 81, 86. See *Jackson v. Indiana*, 406 U.S. 715, 737, 32 L. Ed. 2d 435, 92 S. Ct. 1845 (1972) (recognizing involuntary civil commitment can be based on several grounds); *State v. Post*, 197 Wis. 2d at 304-05.

The plurality opinion in *Foucha* found three specific constitutional shortcomings in Louisiana's law which are not present here. First, the Court found Foucha was entitled to a determination in a civil commitment hearing of his current mental illness and dangerousness. 504 U.S. at 78. Hendricks is specifically provided with those procedural protections.

Second, after Foucha could no longer be held as an insanity acquittee, he was entitled to procedures to establish the grounds of his confinement, which were not provided. 504 U.S. at 79. There is no similar problem here.

Third, the Court held it was substantively unfair to confine a mentally healthy individual solely based on his predicted dangerousness. The State did not claim, nor did it have to prove under the Louisiana statute, that Foucha suffered any ailment of the mind. 504 U.S. at 80. In the present case, our Act requires the State to prove a specifically defined type of mental ailment–a "mental abnormality." Hendricks' own testimony, as well as that of Dr. Befort, was admitted to support this burden.

Even if the plurality opinion in *Foucha* were applicable, it failed to garner the support of a majority of the Supreme Court as precedent for future cases. Justice O'Connor, in concurring, wrote: "I write separately, however, to emphasize that the Court's opinion addresses only the specific statutory scheme before us, which broadly permits indefinite confinement of sane insanity acquittees in psychiatric facilities. This case does not require us to pass judgment on more narrowly drawn laws . . . ." 504 U.S. at 86-87.

The majority opinion in our case rests on the erroneous conclusion that our Act is constitutionally infirm because it requires no showing of mental illness. It seems to base this conclusion on the absence of those two words. Yet it is not the incantation of "mental illness" that has constitutional significance, but the substance of the statute. Nor is mental illness an inflexible standard capable of precise meaning. As noted in *State v. Post*, 197 Wis. 2d at 304. "[T]he Supreme Court has declined to enunciate a single definition that must be used as the mental condition sufficient for involuntary mental commitments. The Court has wisely left the job of creating statutory definitions to the legislators who draft state law."

The question is not whether Hendricks fits some clinical definition of mental illness, but whether he fit a legislative classification that is more than mere idiosyncratic behavior "within a range that is generally acceptable." *Addington*, 441 U.S. at 426-27. And, whether that definition strikes an appropriate balance between a compelling interest of the State and the liberty interest of the individual--that is, whether it passes strict scrutiny.

Moreover, it is important to note that this balancing test must consider the facts of Hendricks' case and not hypothetical situations that may or may not arise under the statute. The United States Supreme Court has not recognized an "overbreadth" doctrine outside the limited context of the First Amendment. *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987).

Our Act requires an ailment of the mind rising to either the level of a personality disorder or a "mental abnormality." The evidence in this case establishes that Hendricks did not have a personality disorder. The basis for commitment the State did use, that Hendricks has a mental abnormality, requires considerably more than evidence of idiosyncratic behavior which is within a range that is generally acceptable. It requires "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." K.S.A. 59-29a02(b).

Contrary to the majority opinion, this definition is not rendered meaningless by circularity. It clearly requires something more than a transitory inclination toward sexual violence generally. A person does not meet this standard for suffering from an ailment of the mind unless the person has both an ongoing mental pathology and that pathology is so severe as to prompt sexually violent *behavior*. The nature of the mental abnormality required before confinement is available is further limited by the fact that the mental abnormality must be of a type that makes the person likely to engage in a specific and limited type of sexual violence--predatory acts--in a specific setting--outside a secure facility. See K.S.A. 59-29a02(a).

While it is true that the definition of the ailment of the mind justifying the civil commitment under the Act is not identical to that justifying civil commitment of other dangerous mentally ill persons, this presents no constitutional barrier as the United States Supreme Court has not imposed a specific definition of "mental illness" for constitutional purposes. The Kansas Legislature's decision to define "mentally ill person" in one context in K.S.A. 59-2902(h) does not impose a constitutional limitation on its ability to utilize a similar concept with fundamental differences for another purpose unless it violates constitutional guarantees of equal protection, which it does not, as we will later consider.

Nor is it critical that the Kansas Legislature defined "mental abnormality" as a classification that had not been explicitly recognized by the psychiatric community. The term "mental illness" itself is not defined in the DSM-IV. The DSM-IV is not in either design or fact a legal instrument, but merely a compendium of current thought among contemporary practitioners. The DSM-IV reflects only one perspective of the classification of mental disorders, and it violates no constitutional principle for the Kansas Legislature to select another.

> "[T]here has been little agreement on which disorders should be included and the optimal method for their organization. The many nomenclatures that have been developed during the past two millennia have differed in their relative emphasis on phenomenology, etiology, and course as defining features. Some systems have included only a handful of diagnostic categories; others have included thousands. Moreover, the various systems for categorizing mental disorders have differed with respect to whether their principle objective was for use in clinical, research, or statistical settings." DSM-IV, Historical Background, p. xvi.

The DSM-IV itself acknowledges the shortcomings of its classification scheme as a mechanism to identify all mental disorders which might be relevant in different contexts. It clearly acknowledges its limitations in stating:

> "Moreover, although this manual provides a classification of mental disorders, it must be admitted that no definition adequately specifies precise boundaries for the concept of 'mental disorder.' The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations. . . . [D]ifferent

situations call for different definitions." DSM-IV, Definition of Mental Disorder, p. xxi.

Thus, the fact that the legislature has chosen different definitions of mental ailments, and drawn the boundaries of what is a "mental abnormality" in accordance with its limited purposes, is not an indictment of the statutory scheme, but rather is to its credit. It reflects that the legislature has narrowly tailored its statute to include only those persons presenting the precise danger the statute seeks to abate. The DSM-IV defines classifications for purposes completely unrelated to protecting the public from sexually violent predators, and therefore it is of no moment that its classification of mental disorders differs from that adopted by the legislature.

There is no justification for linking constitutional standards to the shifting sands of academic thought reflected in the DSM-IV and its frequent revisions. "The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency." DSM-IV, Cautionary Statement, xxvii.

In light of the DSM-IV's purpose and design, it would be misguided to rely on it as a source of constitutional limitation on legislative power. The United States Supreme Court explained in *Jones*, 463 U.S. at 364 n.13:

> "We do not agree with the suggestion that Congress' power to legislate in this area depends on the research conducted by the psychiatric community. We have recognized repeatedly the 'uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment . . . .' [Citations omitted.] The lesson we have drawn is

not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments."

Our treatment of the insanity defense in criminal cases presents a fitting analogy. Kansas follows the *M'Naghten* test: "Under the *M'Naghten* test for criminal insanity, a defendant is to be held not criminally responsible where he does not know the nature and quality of his act or where he does not know right from wrong with respect to that act." *State v. Baker*, 249 Kan. 431, Syl. ¶ 10, 819 P.2d 1173 (1991). The DSM-IV does not contain a classification of insanity matching our legal definition. Nevertheless, we permit both lay and expert opinion on the question of criminal insanity. *State v. Harkness*, 252 Kan. 510, Syl. ¶ 11, 847 P.2d 1191 (1992).

Consequently, the substantive due process analysis reduces to this: Has the State shown a compelling interest to which its statutory scheme for involuntary commitment is narrowly tailored? As discussed above, the State interest in confining and treating sexual predators is the protection of the public from random violent sexual attack by persons known to the State to be likely to carry out such attacks. "[I]t is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions." *Personal Restraint of Young*, 122 Wash. 2d 1, 26, 857 P.2d 989 (1993).

Is the Sexually Violent Predator Act sufficiently narrowly tailored to achieve the State's compelling interest? I would answer this question with a ringing "yes." The Act is narrowly tailored in a number of particulars. First, it does not apply to sex offenders generally, or even to all sex offenders suffering some ailment of the mind, but applies only to those persons with an ongoing mental condition rendering them likely to commit acts of sexual violence. Second, it does not apply to those susceptible to less restrictive treatment, but only to those who require secure confinement to prevent such violence. Third, to reduce the risk of erroneous detention it does not apply to all persons accused of sexually violent offenses, but only those previously charged or

convicted. Fourth, it does not apply in the face of meager, or even clear and convincing evidence, but requires the State to prove beyond a reasonable doubt that a person qualifies for confinement. Fifth, consistent with its narrowly focused goals, it requires treatment outside the Department of Corrections. Sixth, it has adequate provisions for continuing reviews to ensure that only those persons representing a continuing danger are confined and treated. These are not all the reasons but are more than sufficient to require us to uphold the constitutionality of the Act.

For all of the reasons stated, I would hold that under established substantive due process analysis, the Act is narrowly tailored to serve a compelling State interest and therefore passes constitutional muster.

Although this dissent has answered the grounds for constitutional invalidity relied on by the majority, I write further, although not in great depth, about each additional issue raised by Hendricks which I would hold to be insufficient to require the reversal of his adjudication as a sexually violent predator.

Equal Protection

The "equal protection of the law" is guaranteed to all persons by both the Fourteenth Amendment to the United States Constitution and the Bill of Rights of the Kansas Constitution §§ 1 and 2.

Our decision on this issue is foretold by what we have said about the substantive due process issue herein. The difference between due process and equal protection is well established in *Peterson v. Garvey Elevators, Inc.* 252 Kan. 976, Syl. ¶ 1, 850 P.2d 893 (1993), where we state:

> "The difference between the constitutional concepts of due process and equal protection is that due process emphasizes fairness between the state and the individual dealing with the

state, regardless of how other individuals in the same situation are treated, while equal protection emphasizes disparity in treatment by the state between classes of individuals whose situations arguably are indistinguishable."

Nevertheless, the test for determining the constitutionality of a statute under due process and equal protection weighs almost identical factors. *Clements v. United States Fidelity & Guaranty Co.*, 243 Kan. 124, 127, 753 P.2d 1274 (1988). When a statute is attacked as violative of equal protection, the initial inquiry becomes which standard of scrutiny to apply. I have already answered this question and explained why I would hold the Act survives strict scrutiny.

I would also hold that Hendricks' contention that similarly situated people are not treated similarly is totally without merit. All members of the class of persons of which Hendricks is a part are subject to treatment identical to that which he has received. Hendricks argues that the Act applies only to people who commit sex offenses and not other violent crimes; that the Act applies only to those who meet the definition of a sexually violent predator and not people convicted of incest; and that the Act applies a different standard of ailment of the mind to confine sexually violent predators than is used to confine other dangerous mentally ill people and subjects them to materially different procedures. None of the groups Hendricks compares to sexually violent predators are similarly situated for the limited and narrow purpose of the Act.

The legislature has broad constitutional authority to adopt statutory programs to confine and treat people who might be dangerous to themselves or others and who suffer from some mental ailment, whether a mental abnormality, a personality disorder, or mental illness as statutorily defined. However, the legislature is under no duty to act to the fullest extent of its authority, and the Constitution is not offended merely because the exercise of legislative power may result in some inequality. See *Clements*, 243 Kan. at 128; *Manzanares v. Bell*, 214 Kan. 589, 612, 522 P.2d 1291 (1974).

The Act focuses on the narrow problem of mental abnormality and violent, predatory sex crimes. The testimony of Senator Vancrum, previously quoted, shows the target group was "a small number of habitual sex offenders, who because of their psychological makeup, pose an immediate danger to the public."

Equal protection of the law does not require the State to choose between attacking every aspect of a public danger or not attacking any part of the danger at all. As we said in *Manzanares*:

> "'[T]he legislative authority, acting within its proper field, is not bound to extend its regulations to all cases it might possibly reach. The legislature is "free to recognize degrees of harm and may confine its restrictions to those classes of cases where the need is deemed to be clearest." If "the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied."'" *Manzanares*, 214 Kan. at 615 (quoting *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578 [1937]).

A statute does not violate equal protection just because it does not go as far as it might have gone. *State ex rel. Schneider v. Liggett*, 223 Kan. at 619.

The Act does not violate equal protection principles for the same reason it does not violate substantive due process--it is narrowly tailored to deal with a compelling State interest.

Civil or Punitive Nature of Act

Hendricks appeals the trial court's finding that the Act is civil in nature and remedial, contending it is criminal and punitive. If the Act is criminal, Hendricks contends it is unconstitutional because it violates the constitutional prohibitions

against double jeopardy and ex post facto laws. Since the arguments as to the second contention depend on whether the Act is civil or criminal in nature that must be first considered.

The Kansas Legislature's intention to make the Act a civil statute is clear. The preamble of the Act, which has been previously quoted in its entirety, concludes by stating: "[T]herefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature." K.S.A. 59-29a01.

A person committed under the Act is placed in the custody of the Secretary of SRS, not the Department of Corrections. K.S.A. 59-29a07(a). The provisions for commitment are similar to those for involuntary civil commitment under K.S.A. 59-2901 *et seq*. The classification established by the legislature will not be ignored by the court absent the *clearest proof* that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention that the proceeding be civil. *United States v. Ward*, 448 U.S. 242, 249, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980).

The United States Supreme Court in *Ward* held that we first determine whether the legislature has applied a "civil" label to the statute and then whether the statutory scheme was so punitive either in purpose or effect as to negate that label. 448 U.S. at 248-49.

We have recently considered how a court determines whether a statutory enactment is truly remedial or punitive in character. A sanction which protects the public from harm is remedial in nature. *State v. Mertz*, 258 Kan. 745, 754, 907 P.2d 847 (1995). "Legislation which is regarded as remedial in its nature includes statutes having for their purpose the promotion of justice and the advancement of public welfare and beneficial public objects, such as the protection of health, morals, and safety of society, or of the public generally." *Mertz*, 258 Kan. 745, Syl. ¶ 9.

There is no single feature which determines whether a statute is civil or criminal. Instead the court takes a commonsense, broad view, considering several factors:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment--retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963).

In *Allen v. Illinois*, 478 U.S. 364, 368-74, 92 L. Ed. 2d 296, 106 S. Ct. 2988 (1986), the United States Supreme Court held that the Illinois Sexually Dangerous Persons Act, which provided for the confinement and treatment of sexually dangerous persons, was civil in character such that a person subject to it could not claim the protection of the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution. The Court found that by mandating care and treatment and providing for release if the person was no longer dangerous,

> "the State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement. The Act thus does not appear to

promote either of 'the traditional aims of punishment--retribution and deterrence.'" 478 U.S. at 370.

Like the Illinois Act, the commitment under our Act for care and treatment may continue only "until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." K.S.A. 59-29a07(a).

Hendricks argues the Act is criminal in nature because it requires a showing of scienter, which he supports by claiming the Act applies to those convicted of a sexually violent offense. See K.S.A. 59-29a01. Inconsistent with this argument is the fact the Act also applies to those *charged* with sexually violent offenses. In such cases, no finding of criminal intent would accompany civil commitment. Additionally, the United States Supreme Court rejected a similar argument in *Allen*, 478 U.S. at 370:

> "[Petitioner] first notes that the State cannot file a sexually-dangerous-person petition unless it has already brought criminal charges against the person in question. . . . In addition, the State must prove that the person it seeks to commit perpetrated 'at least one act of or attempt at sexual assault or sexual molestation.' 107 Ill. 2d, at 105, 481 N. E. 2d, at 697. To petitioner, these factors serve to distinguish the Act from other civil commitments, which typically are not tied to any criminal charge and which the petitioner apparently concedes are not 'criminal' under the Self-Incrimination Clause. . . . We disagree. That the State has chosen not to apply the Act to the larger class of mentally ill persons who might be found sexually dangerous does not somehow transform a civil proceeding into a criminal one."

The existence of previous or pending criminal convictions or charges serves only the limited purpose of identifying the group of individuals within which sexually violent predators might be found.

The testimony of individuals before the Senate and House Judiciary Committees that the Act was geared toward continued incarceration is repudiated by the stated legislative purpose, the civil nature of the commitment, and the specific requirement in K.S.A. 59-29a09 that the detention of persons "shall conform to constitutional requirements for care and treatment."

I would reject Hendricks' contention that the practical effect of the Act is indeterminate incarceration and the statement of the majority that treatment for sexually violent predators is all but nonexistent. The existence or extent of the specific care and treatment Hendricks has or will receive is not at issue here. It is clear that treatment is statutorily and constitutionally required. Further, the perspective of the committed individual is not what is relevant: "In determining if a civil proceeding has a retributive, deterrent, or remedial purpose, a court must use common sense. The court makes this determination from the objective viewpoint and not from the subjective viewpoint of the defendant." *State v. Mertz*, 258 Kan. 745, Syl. ¶ 6. The mere fact of commitment "does not itself trigger the entire range of criminal procedural protections." *Allen*, 478 U.S. at 372.

The legislature's purpose was the protection of society from those rendered sexually dangerous by a mental ailment and the treatment of such people. Together, these are permissible goals of a civil commitment scheme and do not convert the Act into a criminal statute. See *Allen*, 478 U.S. at 373. I would hold the Act to be civil in nature; thus, it should be evaluated by the standards applicable to such statutes.

Double Jeopardy

A claim of double jeopardy generally applies only to criminal matters, and our finding that the Act is civil in nature diminishes any basis for this claim. Irrespective of our earlier holding, the claim must fail since none of the types of constitutionally guaranteed double jeopardy protection are available to assist Hendricks. Justice Abbott explained in *Mertz*:

> "The Fifth Amendment Double Jeopardy Clause of the United States Constitution states: '[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.' The double jeopardy guaranty is enforceable against the states through the Fourteenth Amendment. *North Carolina v. Pearce*, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969). Kansas also enforces an analogous double jeopardy clause in Section 10 of the Kansas Constitution Bill of Rights. It states: 'No person shall . . . be twice put in jeopardy for the same offense.' The double jeopardy protection guaranteed in the Kansas Constitution Bill of Rights is equivalent to the protection guaranteed in the United States Constitution. See *State v. Cady*, 254 Kan. 393, 396-97, 867 P.2d 270 (1994). The double jeopardy clause provides three different types of protection for a person charged with a crime. Double jeopardy protection shields an accused from '(1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.' 254 Kan. 396 (citing *Brown v. Ohio*, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 [1977])." 258 Kan. at 749.

The first type of protection has no application here because Hendricks was not acquitted of any offense. The second type of protection would apply only if the civil

commitment proceeding were a prosecution for the same offenses of which Hendricks was convicted. As noted above, the Act is not concerned with Hendricks' past actions except to the extent they evidence his current dangerousness and mental ailment. Hendricks acknowledges that the second type of protection is implicated only if the Act is criminal in character rather than civil.

The third type of double jeopardy protection, relating to multiple punishments for the same offense, can be implicated even in a proceeding labeled as civil. *United States v. Halper*, 490 U.S. 435, 447-48, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989). Thus, a civil sanction disproportionate to the harm actually caused may qualify as punishment for double jeopardy purposes. 490 U.S. at 448. "Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment. These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence." 490 U.S. at 448-49. "[A] civil sanction is violative of the Double Jeopardy Clause only if it 'may not fairly be characterized as remedial, but only as a deterrent or retribution.' *Halper*, 490 U.S. at 448-49." *State v. Carpenter*, 197 Wis. 2d 252, 264, 541 N.W. 2d 105 (1995).

As noted above, the legislative purpose of the Act is public safety and treatment of those committed, not retribution or deterrence. Since it is remedial in nature and seeks neither punishment nor retribution, it does not constitute a double jeopardy violation.

Ex post facto

Hendricks' contention that the Act is unconstitutional as an ex post facto law is without any merit.

An ex post facto law punishes as a crime an act previously committed that was innocent when done, increases the punishment for a crime after its commission,

or deprives an accused of any defense which was available by law at the time the act was committed. *Collins v. Youngblood*, 497 U.S. 37, 42, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990). Since the Act, as a civil statute, neither criminalizes conduct legal before its passage nor imposes punishment for a crime, it does not violate the Ex Post Facto Clause. Its concern is the *current* mental condition of the person subject to commitment and his or her *present* dangerousness, not any past behavior except as relevant to show current condition.

Procedural Due Process

Hendricks' argument that the Act violates procedural due process must also fail. Procedural due process guarantees apply only to liberty and property interests encompassed by the Fourteenth Amendment. *Jacobs, Visconsi & Jacobs v. City of Lawrence*, 927 F.2d 1111, 1115 (10th Cir. 1991). The fundamental requirement of due process is a fair trial in a fair tribunal. *State v. Green*, 245 Kan. 398, 404, 781 P.2d 678, *cert. denied* 114 S. Ct. 1848 (1989). The concept of due process is flexible and does not require the same kinds of procedural safeguards in all situations. *In re Marriage of Soden*, 251 Kan. 225, Syl. ¶ 6, 834 P.2d 358, *cert. denied* 121 L. Ed. 2d 540 (1992). The procedures that must be afforded an individual depend on the nature of the loss the individual faces and whether the government's interest in a more abbreviated procedure outweighs the individual's interest. *In re Cooper*, 230 Kan. 57, Syl. ¶ 3, 631 P.2d 632 (1981).

The outline of the Act at the beginning of this dissent shows Hendricks is provided with a panoply of procedural rights. "The essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case." *Crane v. Mitchell County U.S.D. No. 273*, 232 Kan. 51, Syl. ¶ 1, 652 P.2d 205 (1982).

The Act clearly provides all the necessary basic protections, including appointed counsel, a probable cause hearing, appointment of qualified experts or professional persons, a jury trial with unanimous decision, appeals, annual

examinations, discharge petitions, hearings, and the strictest possible burden of proof on the State.

Hendricks' argument that the Act denies him the right to remain silent is meritless, as the United States Supreme Court has clearly held that the protection against self-incrimination has no application in the civil commitment of sexually violent persons. Such protections come neither from the Fifth Amendment nor the Due Process Clause. See *Allen*, 478 U.S. at 368-74.

Hendricks has failed to overcome the presumption of the constitutionality of the Act on the grounds of double jeopardy, ex post facto, and procedural due process largely because the Act is not punitive but remedial, not criminal but civil.

Hendricks' 1984 plea agreement

In exchange for his 1984 plea, Hendricks recounts that the State agreed to dismiss one of three counts of indecent liberties, not seek application of the Habitual Criminal Act, and recommend a prison sentence of 5 to 20 years on the remaining two counts, to be run concurrently.

Hendricks contends that he had served the required time to be released and the institution of proceedings to commit him for care and treatment violated his 1984 plea agreement.

Hendricks relies on *State v. Wills*, 244 Kan. 62, 765 P.2d 1114 (1988). In *Wills*, this court held that the State's unqualified agreement to make a specific sentencing recommendation was binding not only at the original sentencing hearing, but also at a hearing on a motion to modify the sentence.

Hendricks' argument is unpersuasive. First, Hendricks' 1984 conviction was not the basis for his involuntary commitment. His involuntary commitment was based

solely on his mental ailment and present dangerousness. His 1984 conviction served only to identify him as a member of the pool of people potentially subject to the Act. Second, *Wills* stands for the limited proposition that an unqualified agreement as to the scope of *punishment* for an offense remains binding on the State after the original sentencing. Hendricks' present confinement is not punishment for any offense but merely civil commitment based on his mental condition. Civil commitment following the service of the sentence is collateral to the plea and independent of the criminal case. See *George v. Black*, 732 F.2d 108, 110-11 (8th Cir. 1984). Third, under the Act, Hendricks' conviction of, and thus his guilty plea to sexually violent offenses is immaterial. A person who is charged with such offenses is identified as within the pool to whom the Act might apply. The State did not violate the plea agreement.

Statutory Vagueness or Overbreadth

Hendricks' claim that the Act is violative of due process because it is too vague and overbroad in definition, in procedure, in purpose, and in application must also fail, primarily because the language of the Act, as summarized earlier, is clear.

We remain duty bound to avoid a vague construction of the Act if reasonably possible. *Boatright v. Kansas Racing Comm'n*, 251 Kan. 240, Syl. ¶ 1, 834 P.2d 368 (1992). Where the statute at issue does not impose criminal penalties, a commonsense determination of fairness is the standard for determining vagueness. See *Boatright*, 251 Kan. 240, Syl. ¶ 3. We need not again detail all the provisions of the Act previously referred to herein to answer Hendricks' claim. The Act is comprehensive, understandable, capable of application, and sufficiently clear and definite to withstand a vagueness challenge.

Scope of Expert Testimony

Hendricks' argument that the trial court's limitation of his expert's testimony about a few technical details of certain academic studies amounts to reversible error is equally unconvincing.

To prevail on appeal, Hendricks must establish that the trial court abused its discretion. See *State v. Friberg*, 252 Kan. 141, 147, 843 P.2d 218 (1992). Judicial discretion is abused only where no reasonable person would take the view of the trial court. *State v. Warden*, 257 Kan. 94, 116, 891 P.2d 1074 (1995).

From a review of the record it is apparent the trial court permitted Hendricks' expert to testify about all relevant conclusions within his field of expertise. Reasonable people could agree the excluded details could confuse the jury without materially advancing Hendricks' position. Additionally, it does not appear that Hendricks attempted to offer the disputed evidence to the jury or that a proper proffer was made to preserve this issue for consideration on appeal.

Dr. Logan is an experienced psychiatrist who opined that based on numerous studies, mental health professionals erroneously predicted future unlawful behavior two out of three times and treatment has little effect on the recidivism rate for pedophiles. The evidence directly countered Dr. Befort's opinion and Hendricks' admissions, and it was up to the jury to consider its weight.

Sufficiency of Evidence

Because the State's burden under the Act requires proof beyond a reasonable doubt, our standard of review is whether, after viewing all the evidence, viewed in the light most favorable to the State, we are convinced that a rational factfinder could have found Hendricks was a sexually violent predator beyond a reasonable doubt.

Dr. Befort's expert testimony, Hendricks' own testimony that he could not guarantee he would stop his sexual attacks on children, Hendricks' entire life history, and the testimony of three of his victims, including two stepchildren, are clearly sufficient to support the jury's unanimous verdict.

Conclusion

For all of the reasons hereinbefore set forth, I dissent from this court's opinion and would hold that the Kansas Sexually Violent Predator Act is constitutional. The trial court should be affirmed.

McFARLAND, C.J., and SIX, J., join in the foregoing dissenting opinion.

APPENDIX B

Sexual Predator Act

K.S.A. 59-29a01 et. seq.

K.S.A. 59-29a01

59-29a01. Commitment of sexually violent predators; legislative findings.

The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under K.S.A. 59-2901 et seq. and amendments thereto, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature.
History: L. 1994, ch. 316, 1; May 19.

K.S.A. 59-29a02

59-29a02. Same; definitions.
As used in this act:
(a) ``Sexually violent predator" means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, if not confined in a secure facility.
(b) ``Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.
(c) ``Predatory" means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.
(d) ``Sexually motivated" means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.
(e) ``Sexually violent offense" means: (1) Rape as defined in K.S.A. 21-3502 and amendments thereto;

(2) indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto;
(3) aggravated indecent liberties with a child as defined in K.S.A. 21-3504 and amendments thereto;
(4) criminal sodomy as defined in subsection (a)(2) and (a)(3) of K.S.A. 21-3505 and amendments thereto;
(5) aggravated criminal sodomy as defined in K.S.A. 21-3506 and amendments thereto;
(6) indecent solicitation of a child as defined in K.S.A. 21-3510 and amendments thereto;
(7) aggravated indecent solicitation of a child as defined in K.S.A. 21-2511 and amendments thereto;
(8) sexual exploitation of a child as defined in K.S.A. 21-3516 and amendments thereto;
(9) aggravated sexual battery as defined in K.S.A. 21-3518 and amendments thereto;
(10) any conviction for a felony offense in effect at any time prior to the effective date of this act, that is comparable to a sexually violent offense as defined in subparagraphs (1) through (9) or any federal or other state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this section;
(11) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 and 21-3303, and amendments thereto, of a sexually violent offense as defined in this subsection; or
(12) any act which either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated.
(f) ``Agency with jurisdiction" means that agency which releases upon lawful order or authority a person serving a sentence or term of confinement and includes the department of corrections, the department of social and rehabilitation services and the Kansas parole board.
History: L. 1994, ch. 316, 2; L. 1995, ch. 193, 1; May 4.

K.S.A. 59-29a03

59-29a03. [Effective January 1, 1996.] Same; Notice of release of sexually violent predator by agency with jurisdiction to prosecuting attorney, time, contents; immunity from liability.
(a) When it appears that a person may meet the criteria of a sexually violent predator as defined in K.S.A. 59-29a02 and amendments thereto, the agency with jurisdiction shall give written notice of such to the attorney general and the multidisciplinary team established in subsection (d), 90 days prior to:
(1) The anticipated release from total confinement of a person who has been convicted of a sexually violent offense, except that in the case of persons who are returned to prison for no more than 90 days as a result of revocation of postrelease supervision, written notice shall be given as soon as practicable following the person's readmission to prison;
(2) release of a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial pursuant to K.S.A. 22-3305 and amendments thereto;
(3) release of a person who has been found not guilty by reason of insanity of a sexually violent offense pursuant to K.S.A. 22-3428 and amendments thereto; or
(4) release of a person who has been found not guilty of a sexually violent offense pursuant to

K.S.A. 22-3428, and amendments thereto, and the jury who returned the verdict of not guilty answers in the affirmative to the special question asked pursuant to K.S.A. 22-3221.

(b) The agency with jurisdiction shall inform the attorney general and the multidisciplinary team established in subsection (d) of the following:

(1) The person's name, identifying factors, anticipated future residence and offense history; and

(2) documentation of institutional adjustment and any treatment received.

(c) The agency with jurisdiction, its employees, officials, members of the multidisciplinary team established in subsection (d), members of the prosecutor's review committee appointed as provided in subsection (e) and individuals contracting, appointed or volunteering to perform services hereunder shall be immune from liability for any good-faith conduct under this section.

(d) The secretary of corrections shall establish a multidisciplinary team which may include individuals from other state agencies to review available records of each person referred to such team pursuant to subsection (a). The team, within 30 days of receiving notice, shall assess whether or not the person meets the definition of a sexually violent predator, as established in K.S.A. 59-29a02 and amendments thereto. The team shall notify the attorney general of its assessment.

(e) The attorney general shall appoint a prosecutor's review committee to review the records of each person referred to the attorney general pursuant to subsection (a). The prosecutor's review committee shall assist the attorney general in the determination of whether or not the person meets the definition of a sexually violent predator. The assessment of the multidisciplinary team shall be made available to the attorney general and the prosecutor's review committee.

History: L. 1994, ch. 316, 3; L. 1995, ch. 193, 2; L. 1995, ch. 251, 33; January 1, 1996.

K.S.A. 59-29a04

59-29a04. Same; petition, time, contents.

When it appears that the person presently confined may be a sexually violent predator and the prosecutor's review committee appointed as provided in subsection (e) of K.S.A. 59-29a03 and amendments thereto has determined that the person meets the definition of a sexually violent predator, the attorney general may file a petition, within 75 days of the date the attorney general received the written notice by the agency of jurisdiction as provided in subsection (a) of K.S.A. 59-29a03 and amendments thereto, alleging that the person is a sexually violent predator and stating sufficient facts to support such allegation.

History: L. 1994, ch. 316, 4; L. 1995, ch. 193, 3; May 4.

K.S.A. 59-29a05

59-29a05. Same; determination of probable cause; evaluation; person taken into custody.

(a) Upon filing of a petition under K.S.A. 59-29a04, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made, the judge shall direct that person be taken into custody.

(b) Within 72 hours after a person is taken into custody pursuant to subsection (a), such person shall be provided with notice of, and an opportunity to appear in person at, a hearing to contest probable cause as to whether the detained person is a sexually violent predator. At this hearing the court shall: (1) Verify the detainer's identity; and (2) determine whether probable cause exists to believe that the person is a sexually violent predator. The state may rely upon the petition and supplement the petition with additional documentary evidence or live testimony.

(c) At the probable cause hearing as provided in subsection (b), the detained person shall have the following rights in addition to the rights previously specified: (1) To be represented by counsel; (2) to present evidence on such person's behalf; (3) to cross-examine witnesses who testify against such person; and (4) to view and copy all petitions and reports in the court file.

(d) If the probable cause determination is made, the court shall direct that the person be transferred to an appropriate secure facility, including, but not limited to, a county jail, for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination.

History: L. 1994, ch. 316, 5; L. 1995, ch. 193, 4; May 4.

K.S.A. 59-29a06

59-29a06. Same; trial; counsel and experts; indigent persons; jury.

Within 60 days after the completion of any hearing held pursuant to K.S.A. 59-29a05 and amendments thereto, the court shall conduct a trial to determine whether the person is a sexually violent predator. The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced. At all stages of the proceedings under this act, any person subject to this act shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist such person. Whenever any person is subjected to an examination under this act, such person may retain experts or professional persons to perform an examination of such person's behalf. When the person wishes to be examined by a qualified expert or professional person of such person's own choice, such examiner shall be permitted to have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court, upon the person's request, shall determine whether the services are necessary and reasonable compensation for such services. If the court determines that the services are necessary and the expert or professional person's requested compensation for such services is reasonable, the court shall assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf. The court shall approve payment for such services upon the filing of a certified claim for compensation supported by a written statement specifying the time expended, services rendered, expenses incurred on behalf of the person and compensation received in the same case or for the same services from any other source. The person, the attorney general, or the judge shall have the right to demand that the trial be before a jury. Such demand for the trial to be before a jury shall be filed, in writing, at least four days prior to trial. Number and selection of jurors shall be determined as provided in K.S.A.

22-3403, and amendments thereto. If no demand is made, the trial shall be before the court.
History: L. 1994, ch. 316, 6; L. 1995, ch. 193, 5; May 4.

K.S.A. 59-29a07

59-29a07. Same; determination; commitment procedure.

(a) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If such determination that the person is a sexually violent predator is made by a jury, such determination shall be by unanimous verdict of such jury. Such determination may be appealed. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care and treatment shall be provided at a facility operated by the department of social and rehabilitation services. At all times, persons committed for control, care and treatment by the department of social and rehabilitation services pursuant to this act shall be kept in a secure facility and such persons shall be segregated at all times from any other patient under the supervision of the secretary of social and rehabilitation services and commencing June 1, 1995, such persons committed pursuant to this act shall be kept in a facility or building separate from any other patient under the supervision of the secretary. The department of social and rehabilitation services is authorized to enter into an interagency agreement with the department of corrections for the confinement of such persons. Such persons who are in the confinement of the secretary of corrections pursuant to an interagency agreement shall be housed and managed separately from offenders in the custody of the secretary of corrections, and except for occasional instances of supervised incidental contact, shall be segregated from such offenders. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release. Upon a mistrial, the court shall direct that the person be held at an appropriate secure facility, including, but not limited to, a county jail, until another trial is conducted. Any subsequent trial following a mistrial shall be held within 90 days of the previous trial, unless such subsequent trial is continued as provided in K.S.A. 59-29a06 and amendments thereto.

(b) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to be released pursuant to K.S.A. 22-3305 and amendments thereto, and such person's commitment is sought pursuant to subsection (a), the court shall first hear evidence and determine whether the person did commit the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on such person's own behalf, the extent to which the evidence could

be reconstructed without the assistance of the person and the strength of the prosecution's case. If after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, the court shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.
History: L. 1994, ch. 316, 7; L. 1995, ch. 193, 6; May 4.

K.S.A. 59-29a08

59-29a08. Same; annual examinations; discharge petitions by persons committed under this act over the secretary's objection at time of annual examination, procedure.

Each person committed under this act shall have a current examination of the person's mental condition made once every year. The person may retain, or if the person is indigent and so requests the court may appoint a qualified professional person to examine such person, and such expert or professional person shall have access to all records concerning the person. The yearly report shall be provided to the court that committed the person under this act. The court shall conduct an annual review of the status of the committed person. Nothing contained in this act shall prohibit the person from otherwise petitioning the court for discharge at this hearing. The secretary of the department of social and rehabilitation services shall provide the committed person with an annual written notice of the person's right to petition the court for release over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the annual report. The committed person shall have a right to have an attorney represent the person at the hearing but the person is not entitled to be present at the hearing. If the court at the hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged, then the court shall set a hearing on the issue. At the hearing, the committed person shall be entitled to be present and entitled to the benefit of all constitutional protections that were afforded the person at the initial commitment proceeding. The attorney general shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate the person on the person's behalf and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if released is likely to engage in acts of sexual violence.
History: L. 1994, ch. 316, 8; L. 1995, ch. 193, 7; May 4.

K.S.A. 59-29a09

59-29a09. Detention and commitment to conform to constitutional requirements.

The involuntary detention or commitment of persons under this act shall conform to

constitutional requirements for care and treatment.
History: L. 1994, ch. 316, 9; May 19.

K.S.A. 59-29a10

59-29a10. Petition for release; procedure.

If the secretary of the department of social and rehabilitation services determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released, the secretary shall authorize the person to petition the court for release. The petition shall be served upon the court and the attorney general. The court, upon receipt of the petition for release, shall order a hearing within 30 days. The attorney general shall represent the state, and shall have the right to have the petitioner examined by an expert or professional person of such attorney's choice. The hearing shall be before a jury if demanded by either the petitioner or the attorney general. The burden of proof shall be upon the attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that if discharged is likely to commit predatory acts of sexual violence.
History: L. 1994, ch. 316, 10; L. 1995, ch. 193, 8; May 4.

K.S.A. 59-29a11

59-29a11. Same; subsequent discharge petitions, limitations.

Nothing in this act shall prohibit a person from filing a petition for discharge pursuant to this act. However, if a person has previously filed a petition for discharge without the secretary of the department of social and rehabilitation services approval and the court determined either upon review of the petition or following a hearing, that the petitioner's petition was frivolous or that the petitioner's condition had not so changed that the person was safe to be at large, then the court shall deny the subsequent petition unless the petition contains facts upon which a court could find the condition of the petitioner had so changed that a hearing was warranted. Upon receipt of a first or subsequent petition from committed persons without the secretary's approval, the court shall endeavor whenever possible to review the petition and determine if the petition is based upon frivolous grounds and if so shall deny the petition without a hearing.
History: L. 1994, ch. 316, 11; May 19.

K.S.A. 59-29a12

59-29a12. Same; secretary of social and rehabilitation services; resposible for costs; duties; reimbursement.

The secretary of social and rehabilitation services shall be responsible for all cost relating to the evaluation and treatment of persons committed to the secretary's custody under any provision of

this act. Reimbursement may be obtained by the secretary for the cost of care and treatment of persons committed to the secretary's custody pursuant to K.S.A. 1993 Supp. 59-2006 and amendments thereto.
History: L. 1994, ch. 316, 12; May 19.

K.S.A. 59-29a13

59-29a13. Same; notice to victims of release of persons committed under this act.

In addition to any other information required to be released under this act, prior to the release of a person committed under this act, the secretary of the department of social and rehabilitation services shall give written notice of such release to any victim of the person's activities or crime who is alive and whose address is known to the secretary or, if the victim is deceased, to the victim's family, if the family's address is known to the secretary. Failure to notify shall not be a reason for postponement of release. Nothing in this section shall create a cause of action against the state or an employee of the state acting within the scope of the employee's employment as a result of the failure to notify pursuant to this action.
History: L. 1994, ch. 316, 13; May 19.

K.S.A. 59-29a14

59-29a14. Same; special allegation of sexual motivation; procedure; withdrawal or dismissal.

(a) The county or district attorney shall file a special allegation of sexual motivation within 10 days after arraignment in every criminal case other than sex offenses as defined in article 35 of chapter 21 of the Kansas Statutes Annotated and amendments thereto, when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder.

(b) In a criminal case wherein there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime with a sexual motivation. The court shall make a finding of fact of whether or not a sexual motivation was present at the time of the commission of the crime, or if a jury trial is had, the jury, if it finds the defendant guilty, also shall find a special verdict as to whether or not the defendant committed the crime with a sexual motivation. This finding shall not be applied to sex offenses as defined in article 35 of chapter 21 of the Kansas Statutes Annotated and amendments thereto.

(c) The county or district attorney shall not withdraw the special allegation of sexual motivation without approval of the court through an order of dismissal of the special allegation. The court shall not dismiss this special allegation unless it finds that such an order is necessary to correct an error in the initial charging decision or unless there are evidentiary problems which make proving the special allegation doubtful.
History: L. 1994, ch. 316, 14; May 19.

K.S.A. 59-29a15

59-29a15. Same; severability.

If any provision of this act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application and, to this end, the provisions of this act are severable.

History: L. 1994, ch. 316, 15; May 19.

K.S.A. 59-29a16

59-29a16. [Same; release of information or records to agency with jurisdiction or attorney general for purpose of meeting notice requirement.]

In order to protect the public, relevant information and records which are otherwise confidential or privileged shall be released to the agency with jurisdiction or the attorney general for the purpose of meeting the notice requirement provided in K.S.A. 59-29a03 and amendments thereto and determining whether a person is or continues to be a sexually violent predator. The provisions of this section shall be part of and supplemental to the provisions of K.S.A. 59-29a01 through 59-29a15 and amendments thereto.

History: L. 1995, ch. 193, 9; May 4.

K.S.A. 59-29a17

59-29a17. [Same; sealing and disclosure of reports, records and statements submitted to court.]

Any psychological reports, drug and alcohol reports, treatment records, reports of the diagnostic center, medical records or victim impact statements which have been submitted to the court or admitted into evidence under this act shall be part of the record but shall be sealed and opened only on order of the court or as provided in K.S.A. 59-29a01 et seq. and amendments thereto. The provisions of this section shall be part of and supplemental to the provisions of K.S.A. 59-29a01 through 59-29a15 and amendments thereto.

History: L. 1995, ch. 193, 10; May 4.

APPENDIX C

Various Kansas Statutes

K.S.A. 21-3503

21-3503. Indecent liberties with a child. (1) Indecent liberties with a child is engaging in any of the following acts with a child who is not married to the offender and who is under 16 years of age:

(a) Sexual intercourse; or

(b) any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or

(c) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

(2) Indecent liberties with a child is a class C felony.

History: L. 1969, ch. 180, § 21-3503; L. 1975, ch. 193, § 1; L. 1983, ch. 109, § 3; L. 1984, ch. 118, § 1; L. 1985, ch. 109, § 2; L. 1987, ch. 108, § 1; April 16.

K.S.A. 21-4501(c)

21-4501. Classes of felonies and terms of imprisonment. For the purpose of sentencing, the following classes of felonies and terms of imprisonment authorized for each class are established:

(c) Class C, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be fixed by the court at not less than three years nor more than five years and the maximum of which shall be fixed by the court to not less than 10 years nor more than 20 years.

K.S.A. 21-4504(b)

21-4504. Conviction of second and subsequent felonies; exceptions.

(b) If a defendant is convicted of a felony a third or subsequent time, the trial judge shall sentence the defendant as follows, upon motion of the prosecuting attorney:

(1) The court shall fix a minimum sentence of not less than the greatest nor more than three times the greatest minimum sentence authorized by K.S.A. 21-4501 and amendments thereto, for the crime for which the defendant is convicted; and

(2) the court may fix a maximum sentence of not less than the least nor more than three times the greatest maximum sentence provided by K.S.A. 21-4501 and amendments therto, for the crime.

History: L. 1969, ch. 180, § 21-4504; L. 1970, ch. 124, § 10; L. 1973, ch. 141, § 1; L. 1978, ch. 120, § 4; L. 1982, ch. 137, § 2; July 1.

K.S.A. 21-4608

21-4608. Multiple sentences. (1) When separate sentences of imprisonment for different crimes are imposed on a defendant on the same date, including sentences for crimes for which suspended sentences, probation or assignment to a community correctional services program have been revoked, such sentences shall run concurrently or consecutively as the court directs. Whenever the record is silent as to the manner in which two or more sentences imposed at the same time shall be served, they shall be served concurrently, except as provided in subsections (3), (4) and (5).

(2) Any person who is convicted and sentenced for a crime committed while on probation, assignment to a community correctional services program, parole or conditional release for a misdemeanor shall serve the sentence concurrently with or consecutively to the term or terms under which the person was on probation, assigned to a community correctional services program or on parole or conditional release, as the court directs.

(3) Any person who is convicted and sentenced for a crime committed while on probation, assigned to a community correctional services program, on parole, on conditional release for a felony shall serve the sentence consecutively to the term or terms under which the person was on probation, assigned to a community correctional services program or on parole or conditional release.

(4) Any person who is convicted and sentenced for a crime committed while on release for a felony pursuant to article 28 of chapter 22 of the Kansas Statutes Annotated shall serve the sentence consecutively to the term or terms under which the person was released.

(5) Any person who is convicted and sentenced for a crime committed while such person is incarcerated and serving a sentence for a felony in any place of incarceration shall serve the sentence consecutively to the term or terms under which the person was incarcerated.

(6) The provisions of this subsection relating to parole eligibility shall be applicable to persons convicted of crimes committed prior to January 1, 1979, but shall be applicable to persons convicted of crimes committed on or after that date only to the extent that the terms of this subsection are not in conflict with the provisions of K.S.A. 22-3717 and amendments thereto. In calculating the time to be served on concurrent and consecutive sentences, the following rules shall apply:

(a) When indeterminate terms run concurrently, the shorter minimum terms merge in and are satisfied by serving the longest minimum term and the shorter maximum terms merge in and are satisfied by conditional release or discharge on the longest maximum term if the terms are imposed on the same date.

(b) When concurrent terms are imposed on different dates, computation will be made to determine which term or terms require the longest period of imprisonment to reach parole eligibility, conditional release and maximum dates, and that sentence will be considered the controlling sentence. The parole eligibility date may be computed and projected on one sentence and the conditional release date and maximum may be computed and projected from another to determine the controlling sentence.

(c) When indeterminate terms imposed on the same date are to be served consecutively, the minimum terms are added to arrive at an aggregate minimum to be served equal to the sum of all minimum terms and the maximum terms are added to arrive at an aggregate maximum equal to

the sum of all maximum terms.

(d) When indeterminate sentences are imposed to be served consecutively to sentences previously imposed in any other court or the sentencing court, the aggregated minimums and maximums shall be computed from the effective date of the subsequent sentences which have been imposed as consecutive. For the purpose of determining the sentence begins date and the parole eligibility and conditional release dates, the inmate shall be given credit on the aggregate sentence for time spent imprisoned on the previous sentences, but not exceeding an amount equal to the previous minimum sentence less the maximum amount of good time credit that could have been earned on the minimum sentence. For the purpose of computing the maximum date, the inmate shall be given credit for all time spent imprisoned on the previous sentence. This method for computation of the maximum sentence shall be utilized for all sentences computed pursuant to this subsection after July 1, 1983.

Nothing in this subsection (6)(d) shall affect the authority of the Kansas parole board to determine the parole eligibility of inmates pursuant to subsection (d) of K.S.A. 22-3717 and amendments thereto.

(e) When consecutive sentences are imposed which are to be served consecutive to sentences for which a prisoner has been on probation, assigned to a community correctional services program, on parole or on conditional release, the amount of time served on probation, assigned to a community correctional services program, on parole or on conditional release shall not be credited as service on the aggregate sentence in determining the parole eligibility, conditional release and maximum dates.

(7) When a definite and an indefinite term run consecutively, the period of the definite term is added to both the minimum and maximum of the indeterminate term and both sentences are satisfied by serving the indeterminate term.

(8) When a defendant is sentenced in a state court and is also under sentence from a federal court or other state court or is subject to sentence in a federal court or other state court for an offense committed prior to the defendant's sentence in a Kansas state court, the court may direct that custody of the defendant may be relinquished to federal or other state authorities and that such state sentences as are imposed may run concurrently with any federal or other state sentence imposed.

History: L. 1969, ch. 180, § 21-4608; L. 1978, ch. 120, § 8; L. 1982, ch. 150, § 1; L. 1983, ch. 111, § 1; L. 1985, ch. 111, § 1; L. 1986, ch. 123, § 9; L. 1987, ch. 113,§ 1; May 7.

K.S.A. 22-3429

22-3429. Deferring sentence pending mental examination. After conviction and prior to sentence and as part of the presentence investigation authorized by K.S.A. 21-4604, the trial judge may order the defendant committed to a state hospital or any suitable local mental health facility for mental examination, evaluation and report. If adequate private facilities are available and if the defendant is willing to assume the expense thereof such commitment may be to a private hospital. A report of the examination and evaluation shall be furnished to the judge and shall be made available to the prosecuting attorney and counsel for the defendant. A defendant may not

be detained for more than 120 days under a commitment made under this section.
History: L. 1970, ch. 129, 22-3429; July 1.

K.S.A. 22-3430

22-3430. Commitment to certain state institutions, when; costs; order of commitment; appeal. If the report of the examination authorized by the preceding section shows that the defendant is in need of psychiatric care and treatment and that such treatment may materially aid in his rehabilitation and that the defendant and society is not likely to be endangered by permitting the defendant to receive such psychiatric care and treatment, in lieu of confinement or imprisonment, the trial judge shall have power to commit such defendant to any state or county institution provided for the reception, care, treatment and maintenance of mentally ill persons. The court may direct that the defendant be detained in such institution until further order of the court or until the defendant is discharged under K.S.A. 22-3431. No period of detention under this section shall exceed the maximum term provided by law for the crime of which the defendant has been convicted. The trial judge shall, at the time of such commitment, make an order imposing liability upon the defendant, or such person or persons responsible for the support of the defendant, or upon the county or the state, as may be proper in such case, for the cost of admission, care and discharge of the defendant.

The defendant may appeal from any order of commitment made pursuant to this section in the same manner and with like effect as if sentenced to a jail, or to the custody of the director of penial institutions had been imposed in this case.
History: L. 1970, ch. 129, 22-3430; July 1.

K.S.A. 22-3431

22-3431. Disposition upon completion of treatment. Whenever it appears to the chief medical officer of the institution to which a defendant has been committed under K.S.A. 22-3430 and amendments thereto, that such person is not dangerous to self or others and that such person will not be improved by further detention in such institution, such person shall be returned to the court where convicted and shall be sentenced, committed, granted probation, assigned to a community correctional services program or discharged as the court deems best under the circumstances. The time spent in a state or county institution pursuant to a commitment under K.S.A. 22-3430 and amendments thereto shall be credited against any sentence, confinement or imprisonment imposed on the defendant.
History: L. 1970, ch. 129, 22-3431; L. 1971, ch. 114, 8; L. 1986, ch. 123, 22; July 1.

K.S.A. 22-3717(a)(c)(1)

22-3717. Parole eligibility; release, when; hearings; rules and regulations; conditions of parole.

(a) Except as otherwise provided by this section, an inmate, including an inmate sentenced pursuant to K.S.A. 21-4618 and amendments thereto, shall be eligible for parole after serving the entire minimum sentence imposed by the court, less good time credits.
(c) Except as provided in subsection (d), if an inmate is sentenced to imprisonment for more than one crime and the sentences run consecutively, the inmate shall be eligible for parole after serving the total of:
(1) The aggregate minimum sentences, as determined pursuant to K.S.A. 21-4608 and amendments thereto, less good time credits for those crimes which are not class A felonies; and

History: L. 1970, ch. 129, 22-3717; L. 1972, ch. 317, 90; L. 1973, ch. 339, 88; L. 1974, ch. 403, 10; L. 1975, ch. 203, 1; L. 1976, ch. 168, 2; L. 1978, ch. 120, 13; L. 1979, ch. 94, 2; L. 1981, ch. 156, 1; L. 1982, ch. 137, 3; L. 1982, ch. 150, 2; L. 1983, ch. 116, 1; L. 1984, ch. 131, 1; L. 1985, ch. 111, 2; L. 1986, ch. 128, 3; L. 1986, ch. 123, 25; L. 1986, ch. 136, 3; L. 1987, ch. 118, 1; L. 1988, ch. 115, 1; May 19.

K.S.A. 22-3718

22-3718. Conditional release.
An inmate who has served the inmate's maximum term or terms, less such work and good behavior credits as have been earned, shall, upon release, be subject to such written rules and conditions as the Kansas parole board may impose, until the expiration of the maximum term or terms for which the inmate was sentenced or until the inmate is otherwise discharged. If the court which sentenced an inmate specified at the time of sentencing the amount and the recipient of any restitution ordered as a condition of release pursuant to this section, the parole board shall order as a condition of release that the inmate pay restitution in the amount and manner provided in the Journal Entry unless the board finds compelling circumstances which would render a plan of restitution unworkable. If the inmate was sentenced before July 1, 1986, and the court did not specify at the time of sentencing the amount and the recipient of any restitution ordered as a condition of release, the parole board shall order as a condition of release that the inmate make restitution for the damage or loss caused by the inmate's crime in an amount and manner determined by the board unless the board finds compelling circumstances which would render a plan of restitution unworkable. If the inmate was sentenced on or after July 1, 1986, and the court did not specify at the time of sentencing the amount and the recipient of any restitution ordered as a condition of release pursuant to this section, the parole board shall not order restitution as a condition of release unless the board finds compelling circumstances which justify such an order.
History: L. 1970, ch. 129, 22-3718; L. 1972, ch. 317, 91; L. 1986, ch. 128, 4; July 1.

K.S.A. 22-3725

22-3725. Good time credits. (a) For the purpose of determining an inmate's eligibility for parole or conditional release, regardless of when the inmate was sentenced or committed the crime for

which sentenced, good time credits shall be allocated as follows:

GOOD TIME TABLE

(Assumed 360-Day Years, 30-Day Months)

SENTENCE	GOOD TIME EARNED			MUST SERVE		
Minimum (or) Maximum	Years	Months	Days	Years	Months	Days
5	2	0	0	3	0	0
20	9	6	0	10	6	0
45	22	0	0	23	0	0
80	39	6	0	40	6	0
100	49	6	0	50	6	0

(b) Maximum good time credits for sentences of less than two years shall be computed as follows: One day for every three days served and one month for every year served.

(c) Maximum good time credits for sentences greater than two years shall be computed as follows: One-half of the sentence less six months.

(d) Good time credits shall be awarded on an earned basis pursuant to rules and regulations adopted by the secretary of corrections.
History: L. 1988, ch. 115, 2; May 19.

K.S.A. 21-4716(a)(2)(G)(ii)
21-4716. Imposition of presumptive sentence; departure sentencing; finding substantial and compelling reasons for departure; mitigating or aggravating factor considered in determining if reasons exist; reasons stated on record. (a) The sentencing judge shall impose the presumptive sentence provided by the sentencing guidelines for crimes committed on or after July 1, 1993, unless the judge finds substantial and compelling reasons to impose a departure. If the sentencing judge departs from the presumptive sentence, the judge shall state on the record at the time of sentencing the substantial and compelling reasons for the departure.
(2) Subject to the provisions of subsection (b)(3), the following nonexclusive list of aggravating factors may be considered in determining whether substantial and compelling reasons for departure exist:

(G) The defendant's current crime of conviction is a crime of extreme sexual violence and the

defendant is a predatory sex offender. As used in this subsection:

(ii) "Predatory sex offender" is an offender who has been convicted of a crime of extreme sexual violence as the current crime of conviction and who:

(a) Has one or more prior convictions of any crimes of extreme sexual violence. Any prior conviction used to establish the defendant as a predatory sex offender pursuant to this subsection shall also be counted in determining the criminal history category; or

(b) suffers from a mental condition or personality disorder which makes the offender likely to engage in additional acts constituting crimes of extreme sexual violence.

History: L. 1992, ch. 239, 16; L. 1993, ch. 291, 263; Amended, L. 1994, ch. 341, 2; July 1.

APPENDIX D

Direct Examination of Dr. Charles Befort
from Habeas Corpus Hearing.

Pawnee County District Court
Case No. 95 C 55

MR. WEILERT: Your Honor, I don't believe they're as specific as is required by the code of civil procedure, but they do have a general denial.

THE COURT: And they're verified.

MR. WEILERT: Yes.

THE COURT: Are you ready to proceed?

MR. WEILERT: Yes, Your Honor.

THE COURT: You may proceed.

MR. WEILERT: Thank you, Your Honor. We would call Charles Befort.

CHARLES BEFORT,

called as a witness in behalf of the Petitioners, being of legal age and after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WEILERT:

Q. Would you tell us your name and occupation please, sir?

A. My name is Charles Befort; I'm chief psychologist at Larned State Hospital.

Q. And Dr. Befort, we've met a few times before, haven't we?

A. Yes, we have.

Q. I'd like to go back to the period of time before we first met, say to about July of 1994, can you tell

us what your occupation was at that time?

A. Same occupation.

Q. Okay. And as I recall, you were the chief psychologist and that included work at both the Larned State Hospital and the State Security Hospital?

A. That's right.

Q. And this once again we're talking about approximately July of 1994, those were or that was a full-time position, was it not?

A. Yes.

Q. And did you have any difficulty at all in filling up your 40 or 50 or 60 hours a week?

A. Not at all.

Q. Can you tell us something about your educational background, sir?

A. I have a doctor of philosophy degree in psychology from Oklahoma State University.

Q. And you have been a licensed psychologist for how long, sir?

A. Since about 1971.

Q. And it's my understanding that you did not have any type of internship or fellowship in the treatment of sexual offenders, is that right?

A. That's right.

Q. And your employment since obtaining your PhD has been at Larned State Hospital, has it not?
A. Yes. And I also work in a mental health center one day a week.
Q. You told me where that was and I don't remember.
A. Greensburg.
Q. The Iroquois Center I believe?
A. That's right.
Q. Now, before July of 1994 then, would it be correct to say that you did not have any specialized advanced training in the treatment of sex offenders?
A. That's correct.
Q. In, I believe it was September of 1994, I along with some other lawyers took your deposition in Mr. Hendricks' case and the case of Richard Beam, is that right?
A. That's right.
Q. And that was at the district attorney's office in Wichita?
A. Yes.
Q. Now, during the course of that deposition you testified that in your opinion you were not qualified to be a director of a sexual treatment program, is that right?
A. I can't remember, but that's probably what I would

testify to.

Q. So here today you feel that you're not qualified to be a director of a sexual treatment program?

A. I am more qualified than I was a year ago, yes.

Q. Okay. The fact remains though that in your personal opinion, you don't, still don't think you're qualified, do you?

A. Not fully.

Q. Now, in, I believe in that same deposition and at times later, you have given some information as to what you felt a sexual treatment program ought to contain, is that correct?

A. I gave that in a deposition a couple of weeks ago.

Q. Okay.

A. That what you're referring to?

Q. That plus I think some others but we'll stick with the one a couple of weeks ago. That was August 16th in Wichita, wasn't it?

A. Yes.

Q. And that was in the case of State of Kansas versus Jack Spratt?

A. Yes.

Q. And in that deposition you talked about the fact that there were no clinical people giving any treatment to the persons confined in the sexual

treatment program at the Larned mental health facility, is that right?

A. Except for me, yes.

Q. Now, in your position as of August 16th of 1995, just a couple weeks ago, you, I believe, said that the offender or pardon me, the people in the sexual treatment program were receiving essentially no treatment; do you recall saying that?

A. Yes.

Q. And that's a true statement, is it not?

A. I believe so.

Q. Are you familiar with a sexual predator treatment program composition which it's my understanding was prepared by Janet McClellan and for the sexual treatment program at Larned?

A. It's been sometime ago, I remember putting it together, yes.

Q. Did you assist in putting that together?

A. Not a great deal, mostly looked it over, checked it for internal consistency and also just to educate myself as to what was in there.

Q. Okay. Who put that treatment program proposal together?

A. I think Ms. McClellan did most of that.

Q. Would it be fair to say that the treatment program

in your opinion as a psychologist should include persons who have an expertise in the psychological and psychiatric fields?

A. Yes.

Q. And would it be your opinion that the director of that program should have expertise in those areas?

A. Not necessarily.

Q. Should there be a, if the director of the program does not have that expertise, should the person in charge of the actual clinical department have that expertise?

A. Yes.

Q. And you've testified that you feel you do not have that expertise, is that correct?

A. Not entirely, that's right.

Q. Now Ms. McClellan, do you know anything about her educational background?

A. Some.

Q. She has degrees, I believe in relating to business and law enforcement, does she not?

A. Yes.

Q. Doesn't have any training in psychology or psychiatry, does she?

A. Not that I know of.

Q. The document that we just spoke of, the sexual

predator treatment program composition, it lists several items that are in bold face required characteristics. One of the required characteristics, number three, is that the program must have adequate staffing in terms of numbers, quantifications and gender representation. Now the sexual treatment program at Larned doesn't have that, does it?

A. Not at this time.

Q. The fourth one is it says that the program must have adequate funding, not only for the necessary and required staff, but for materials, equipment, staff training, resident treatment and education, and for adequate space to carry out its assigned tasks. The program at Larned doesn't have that, does it?

A. I think it has all that. It has plenty of funding and we have lots of space.

Q. You don't have the materials and equipment that you would consider necessary in a sexual treatment program though, do you?

A. I think we have most of it, not all of it.

Q. What don't you have?

A. I don't know if we have the plethysmograph lab in place, I don't know if we have the equipment yet. We're going to have a polygraph lab and I believe

we're still waiting for that. We do have plenty of testing materials and books and videotapes and so forth and we can get whatever we need.

Q. So you have some of that but not all of it?

A. Quite a bit.

Q. In, I believe it was October of 1994, Mr. Hendricks was admitted to the sexual treatment program, is that correct?

A. That's probably right.

Q. And at the time Mr. Hendricks was admitted, actually before that time, you had done an evaluation of Mr. Hendricks, haven't you?

A. Yes.

Q. And you testified at his commitment hearing?

A. Yes.

Q. And at least to a significant degree, your testimony is what resulted in him being committed, isn't that correct?

A. I assume that.

Q. You were the only psychologist who testified on behalf of the state that offered any opinion as to Mr. Hendricks, whether or not he was a sexual predator as defined by the statute?

A. As I recall, that's correct.

Q. You recognize, do you not, sir, that that creates a

significant barrier for you being an effective treatment giver?

A. Yes.

Q. And that's a widely recognized premise in the psychological and psychiatric fields, isn't it?

A. I believe so.

Q. And up until this time you're the only psychologist or psychiatrist that Mr. Hendricks has had any contact with, aren't you? In the sexual treatment program?

A. That's correct.

Q. For the reasons you just stated, would you agree that it would be extremely difficult, if not impossible, for you to give effective treatment to Mr. Hendricks?

A. I assume that, with respect to certain issues, yes.

Q. In fact, those are the, for lack of a better term, the sexual issues that cause him to be here, right?

A. Sexual deviant, yes.

Q. I didn't have a chance to go through a lot of them, but in whatever that big blue book is, it's kind of a history of Mr. Hendricks since he arrived in Larned back in October of '94, for the first several months of that history, your name appears very sporadically, and is that because you saw Mr.

Hendricks very sporadically?
A. That's true.
Q. And that was because you were involved with your other full-time job, right?
A. Right. At that point I was simply consulting psychologist for SRS.
Q. And then at what point did you become the, I believe you're the acting clinical director, is that right?
A. Temporary acting clinical director something, anyway since March the 20th.
Q. And since March the 20th then, pardon me, before March the 20th, did Mr. Hendricks receive any treatment dealing with the sexual deviancy issues that brought him here?
A. Probably a little provided by Mr. Wright.
Q. And who is Mr. Wright?
A. Mr. Wright's a person with a psychology degree who used to be on staff and he saw Mr. Hendricks in individual sessions.
Q. Was that a bachelor's degree in psychology?
A. Master's degree.
Q. Master's degree? And who was supervising him?
A. As a consulting psychologist, he did connect with me quite a bit. We didn't spend a lot of time going over those specifics, though, he just took it from

there, flew by the seat of his pants.

Q. Now correct me if I am wrong, but isn't the law in the State of Kansas regarding master's level psychologist is that they are required to work under the direction of a PhD level psychologist?

A. He wasn't functioning as a psychologist formally.

Q. What was he functioning as?

A. A forensic counselor or forensic specialist, some title.

Q. So something below a master's level psychologist and something below a licensed clinical social worker?

A. Yes.

Q. How long was Mr. Wright on staff?

A. He was one of the first folks on staff, in the summer or early fall, and I believe he left employment in March this year. That's my best recollection.

Q. Okay. So other than whatever contact you had with Mr. Wright, that was the only treatment he got up until March of '95.

A. Basically in terms of counseling, right.

Q. I notice there are some references in Mr. Hendricks' record to some group sessions, notations that you have made?

A. Yes.

Q. Now am I correct, sir, that those group sessions are not dealing with sexual deviancy issues at this point?
A. A few times it may have come up, depending upon what the men wanted to discuss. But for the most part, no.
Q. They're primarily dealing, for lack of a better term, kind of a group session about the fact that there aren't any treatment programs in place, isn't that correct?
A. That has been a gripe, yes.
Q. It's been a consistent gripe throughout your period as acting clinical director, hasn't it?
A. Pretty well.
Q. And basically your response during those sessions has been something along the lines of we're working on it, we're trying to get something in place, that type of thing?
A. Yes.
Q. Now, Mr. Hendricks has been here for about ten months now, right?
A. Yes.
Q. You have had occasion to read the sexual predator law on more than one occasion I'm sure?
A. Yes.

Q. And you know that it requires an annual report to the court?
A. Yes.
Q. Who's going to prepare that report for Mr. Hendricks in October?
A. I don't know. I assume I will.
Q. Now, in making that report, you're going to have to tell the court that he has had no opportunity for meaningful treatment, aren't you?
A. Yes.
Q. And in making a report of that type, you are effectively denying Leroy any possible chance for release in October of 1995, aren't you?
A. In terms of following the statute, the requirement that he's no longer dangerous or likely to engage in such behavior, yes, that hasn't been modified and it certainly hasn't been dealt with in treatment.
Q. And the reason it hasn't been dealt with in treatment is because the sexual treatment program at Larned Correctional Mental Health Facility basically doesn't exist outside of you, isn't that correct?
A. In terms of the addressing the sexual deviance, that's essentially correct.
Q. You recognize Mr. Blumenshine?
A. Yes.

APPENDIX E

Act for the Care and Treatment of Mentally Ill Persons

K.S.A. 59-2901 et. seq.

K.S.A. 59-2901

59-2901. Name and citation of act. The provisions of K.S.A. 59-2901 through 59-2941 and amendments thereto and K.S.A. 1993 Supp. 59-2943 and 59-2944 and amendments thereto shall be known and may be cited as the treatment act for mentally ill persons.
History: L. 1965, ch. 348, 1; L. 1976, ch. 243, 1; L. 1986, ch. 211, 1; L. 1990, ch. 92, 16; Jan. 1, 1991.

K.S.A. 59-2902

59-2902. Definitions. When used in the treatment act for mentally ill persons:
(a) "Conditional release" means release of a patient who has not been discharged but who is permitted by the head of the treatment facility to live apart from the treatment facility pursuant to K.S.A. 59-2924 and amendments thereto.
(b) "Discharge" means the final and complete release from treatment, by either an order of a court pursuant to K.S.A. 59-2923 and amendments thereto or a treatment facility.
(c) "Head of the treatment facility" means the administrative director of a treatment facility or such person's designee.
(d) "Involuntary patient" means a mentally ill person who is receiving treatment under order of a court of competent jurisdiction.
(e) "Lacks capacity to make an informed decision concerning treatment" means that the person, by reason of the person's mental disorder or condition, is unable, despite conscientious efforts at explanation, to understand basically the nature and effects of hospitalization or treatment or is unable to engage in a rational decision-making process regarding hospitalization or treatment, as evidenced by inability to weigh the possible risks and benefits.
(f) "Law enforcement officer" means any sheriff, regularly employed deputy sheriff, state highway patrol officer, regularly employed city police officer, law enforcement officer of any county law enforcement department or regularly employed police officer of any university, community college or Haskell institute, if such police officer of a university, community college or Haskell institute has completed not less than 320 hours of law enforcement instruction at the law enforcement training center or in a training program approved under K.S.A. 74-5604a and amendments thereto.
(g) "Likely to cause harm to self or others" means that the person:
(1) Is likely, in the reasonably foreseeable future, to cause substantial physical injury or physical abuse to self or others or substantial damage to another's property, as evidenced by behavior causing, attempting or threatening such injury, abuse or damage; or
(2) Is substantially unable, except for reason of indigency, to provide for any of the person's basic needs, such as food, clothing, shelter, health or safety causing a substantial deterioration of the person's ability to function on the person's own.
(h) "Mentally ill person" means any person who:
(1) Is suffering from a severe mental disorder to the extent that such person is in need of treatment;
(2) lacks capacity to make an informed decision concerning treatment; and
(3) is likely to cause harm to self or others.
No person who is being treated by prayer in the practice of the religion of any church which teaches reliance on spiritual means alone through prayer for healing shall be determined to be a

mentally ill person unless substantial evidence is produced upon which the district court finds that the proposed patient is likely, in the reasonably foreseeable future, to cause substantial physical injury or physical abuse to self or others or substantial damage to another's property, as evidence by behavior causing, attempting or threatening such injury, abuse or damage.

(i) "Patient" means a person who is a voluntary patient, a proposed patient or an involuntary patient.

(j) "Physician" means a person licensed to practice medicine and surgery as provided by the Kansas healing arts act or a person who is employed by a Kansas state hospital or by an agency of the United States and who is authorized by either government to practice medicine and surgery.

(k) "Proposed patient" means a person for whom an application pursuant to K.S.A. 59-2913 and amendments thereto has been filed.

(l) "Psychologist" means a licensed psychologist, as defined by K.S.A. 74-5302 and amendments thereto.

(m) "Restraints" means the application of any devices, other than human force alone, to any parts of the body of the patient for the purpose of preventing the patient from causing injury to self or others.

(n) "Seclusion" means the placement of a patient, alone, in a locked room, where the patient's freedom to leave is restricted and where the patient is not under continuous observation.

(o) "Severe mental disorder" means a clinically significant behavioral or psychological syndrome or pattern associated with either a painful symptom or serious impairment in one or more important areas of functioning and involving substantial behavioral, psychologic or biologic dysfunction. "Severe mental disorder" does not include a condition which is caused by the use of chemical substances or for which the primary diagnosis is antisocial personality.

(p) "Treatment" means any service intended to promote the mental health of the patient and rendered by a qualified professional licensed or certified by the state to provide such service as an independent practitioner or under the supervision of such practitioner.

(q) "Treatment facility" means any mental health center or clinic, psychiatric unit of a medical care facility, psychologist, physician or other institution or individual authorized or licensed by law to provide either inpatient or outpatient treatment to any patient.

(r) "Voluntary patient" means a person who is receiving treatment at a treatment facility other than by order of any court.

(s) The terms defined in K.S.A. 59-3002 and amendments thereto shall have the meanings provided by that section.

(t) "Mental health center" means any community mental health center organized pursuant to the provisions of K.S.A. 19-4001 through 19-4015, and amendments thereto, or mental health clinic organized pursuant to the provisions of K.S.A. 65-211 through 65-215, and amendments thereto, and licensed in accordance with the provisions of K.S.A. 75-3307b and amendments thereto.

(u) Participating mental health center" means a mental health center which has entered into a contract with the secretary of social and rehabilitation services to provide screening, treatment and evaluation, court ordered evaluation and other treatment services pursuant to the treatment act for mentally ill persons, in keeping with the phased concept of the mental health reform act.

(v) "State psychiatric hospital" means Larned state hospital, Osawatomie state hospital, Rainbow mental health facility and Topeka state hospital.

(w) "Qualified mental health professional" means (1) a physician or psychologist who is employed by a participating mental health center or who is providing services as a physician or psychologist, respectively, under a contract with a participating mental health center, or (2) a

registered masters level psychologist or a licensed specialist social worker or licensed master social worker or a registered nurse who has a specialty in psychiatric nursing who is employed by a participating mental health center and who is acting under the direction of a physician.

(x) "Registered masters level psychologist" means a person registered as a registered masters level psychologist by the behavioral sciences regulatory board under K.S.A. 74-5361 through 74-5373 and amendments thereto.

(y) "Licensed specialist social worker" means a person licensed in a social work practice specialty by the behavioral sciences regulatory board under K.S.A. 65-6301 through 65-6318 and amendments thereto.

(z) "Licensed master social worker" means a person licensed as a master social worker by the behavioral sciences regulatory board under K.S.A. 65-6301 through 65-6318 and amendments thereto.

(aa) "Secretary" means the secretary of social and rehabilitation services.

(bb) "Osawatomie state hospital catchment area" means, except as otherwise defined by rules and regulations of the secretary adopted pursuant to K.S.A. 39-1613 and amendments thereto, the area composed of the following counties: Allen, Anderson, Atchison, Bourbon, Butler, Chautauqua, Cherokee, Cowley, Crawford, Elk, Franklin, Jefferson, Johnson, Labette, Leavenworth, Linn, Miami, Montgomery, Neosho, Wilson, Woodson and Wyandotte.

(cc) "Topeka state hospital catchment area" means, except as otherwise defined by rules and regulations of the secretary adopted pursuant to K.S.A. 39-1613 and amendments thereto, the area composed of the following counties: Brown, Chase, Clay, Cloud, Coffey, Dickinson, Doniphan, Douglas, Ellsworth, Geary, Greenwood, Harvey, Jackson, Jewell, Lincoln, Lyon, Marion, Marshall, McPherson, Mitchell, Morris, Nemaha, Osage, Ottawa, Pottawatomie, Republic, Riley, Saline, Sedgwick, Shawnee, Wabaunsee and Washington.

(dd) "Larned state hospital catchment area" means, except as otherwise defined by rules and regulations of the secretary adopted pursuant to K.S.A. 39-1613 and amendments thereto, the area composed of the following counties: Barber, Barton, Cheyenne, Clark, Comanche, Decatur, Edwards, Ellis, Finney, Ford, Gove, Graham, Grant, Gray, Greeley, Hamilton, Harper, Haskell, Hodgeman, Kearny, Kingman, Kiowa, Lane, Logan, Meade, Morton, Ness, Norton, Osborne, Pawnee, Phillips, Pratt, Rawlins, Reno, Rice, Rooks, Rush, Russell, Scott, Seward, Sheridan, Sherman, Smith, Stafford, Stanton, Stevens, Sumner, Thomas, Trego, Wallace and Wichita.

(ee) "Catchment area" ~~means~~ the Osawatomie state hospital catchment area, the Topeka state hospital catchment area or the Larned state hospital catchment area.

(ff) "Direction" means monitoring and oversight including regular, periodic evaluation of services.

History: L. 1965, ch. 348, 2; L. 1976, ch. 243, 2; L. 1976, ch. 242, 69; L. 1977, ch. 199, 1; L. 1978, ch. 223, 1; L. 1982, ch. 238, 1; L. 1986, ch. 211, 2; L. 1988, ch. 202, 1; L. 1990, ch. 92, 17; L. 1993, ch. 225, 3; April 22.

K.S.A. 59-2903

59-2903. Detention of patients by treatment facilities; authority. A treatment facility may detain any patient subject to the conditions and limitations of this act.

History: L. 1965, ch. 348, 3; L. 1976, ch. 243, 3; July 1.

K.S.A. 59-2904

59-2904. [Repealed.]
History: L. 1965, ch. 348, 4; L. 1970, ch. 230, 1; L. 1976, ch. 243, 4; Repealed, L. 1986, ch 211, 40; July 1.

K.S.A. 59-2905

59-2905. Voluntary admission to treatment facility; application; written information to be given voluntary patient. (a) Any person may be admitted to a treatment facility as a voluntary patient when there are available accommodations and the head of the treatment facility determines such person is in need of treatment therein, except that no such person shall be admitted to a state psychiatric hospital, if there are one or more participating mental health centers located in the catchment area in which the state psychiatric hospital is located, without a written statement authorizing such admission from a qualified mental health professional. Such person, if 18 years of age or older, shall make written application for admission. If such person is less than 18 years of age, then the parent or person in loco parentis to such person may make such written application. If such person is 14 years of age or older, such person may make such written application on such person's own behalf without the consent or written application of such person's parent, guardian or any other person. In any case, if such person is 18 years of age or older and has a guardian, the guardian shall make such application, except as otherwise authorized under K.S.A. 1993 Supp. 59-3018a and amendments thereto and except that, in any case, an application may be made by a guardian under this section only after a hearing conducted in accordance with the provisions of K.S.A. 1993 Supp. 59-3018a and amendments thereto and pursuant to an order entered by the court under K.S.A. 1993 Supp. 59-3018a and amendments thereto authorizing the guardian to admit such person to an appropriate treatment facility under this section. The head of the treatment facility may require a statement of such person's attending physician or a statement of the local health officer of the area in which such person resides that such person is in need of treatment in a treatment facility. Whenever a minor who is 14 years of age or older makes written application on such minor's own behalf and is admitted as a voluntary patient, the head of the treatment facility shall promptly notify the minor's parent or other person in loco parentis of the admittance of such minor.

(b) No person shall be admitted as a voluntary patient under the provisions of this act to any treatment facility unless the head of the treatment facility has informed such person or such person's parent, guardian or person in loco parentis in writing of the following:

(1) The rules and procedures of the treatment facility relating to the discharge of voluntary patients;

(2) the legal rights of a voluntary patient receiving treatment from a treatment facility; and

(3) the types of treatment which are available to the voluntary patient from the treatment facility.

History: L. 1965, ch. 348, 5; L. 1970, ch. 230, 2; L. 1976, ch. 243, 5; L. 1978, ch. 223, 2; L. 1980, ch. 182, 15; L. 1990, ch. 92, 18; Jan. 1, 1991.

K.S.A. 59-2906

59-2906. Discharge of a voluntary patient. The head of a treatment facility shall discharge any voluntary patient whose treatment in the facility is determined by the head of the treatment facility to be no longer advisable. Prior to the discharge, the head of the treatment facility shall give written notice of the discharge to the patient and, if appropriate, to the patient's parent, guardian or person in loco parentis.
History: L. 1965, ch. 348, 6; L. 1976, ch. 243, 6; L. 1986, ch. 211, 3; July 1.

K.S.A. 59-2907

59-2907. Right to discharge of voluntary patient; procedure. (a) The head of a treatment facility shall discharge a voluntary patient within a reasonable time but not to exceed three days, excluding Saturdays, Sundays and legal holidays, after the receipt of such patient's written request for discharge. No patient shall be discharged from a state psychiatric hospital without receiving recommendations from the participating mental health center, if there is one, serving the area where the patient intends to reside, except that such patient shall be discharged within a reasonable time of not to exceed three days, excluding Saturdays, Sundays and legal holidays, after the receipt of such patient's written request for discharge. If the voluntary patient is a minor, the written request for discharge shall be made by the minor's parent or person in loco parentis unless the minor made written application to become a voluntary patient on the minor's own behalf. If a minor 14 or more years of age has made written application to become a voluntary patient on the minor's own behalf and has requested to be discharged, the head of the treatment facility shall promptly inform the minor's parent or other person in loco parentis of the request.
(b) Nothing in this act shall prevent the head of the treatment facility or other person from filing an application for determination of mental illness with respect to a voluntary patient who is refusing reasonable treatment efforts and is likely to cause harm to self or others if discharged.
History: L. 1965, ch. 348, 7; L. 1970, ch. 230, 3; L. 1976, ch. 243, 7; Repealed, L. 1976, ch. 248, 99; Revived, L. 1976, ch. 246, 1; L. 1978, ch. 223, 3; L. 1986, ch. 211, 4; L. 1990, ch. 92, 19; Jan. 1, 1991.

K.S.A. 59-2908

59-2908. Emergency observation; detention; authority of law enforcement officers. (a) Any law enforcement officer who has reasonable belief upon observation that any person is a mentally ill person and because of such person's illness is likely to cause harm to self or others if allowed to remain at liberty may take the person into custody without a warrant. The officer shall transport the person to any treatment facility where the person shall be examined by a physician or psychologist on duty at the treatment facility, except that no person shall be transported to a state psychiatric hospital for examination, if there are one or more participating mental health centers located in the catchment area in which the state psychiatric hospital is located, unless a written statement recommending evaluation at a state psychiatric hospital has been obtained from a qualified mental health professional. If no physician or psychologist is on duty at the time the person is transported to the treatment facility, the person shall be so examined within a reasonable time not to exceed 17 hours. If a written statement is made by the physician or psychologist at the treatment facility that after preliminary examination the physician or psychologist believes the person to be a mentally ill person and because of the person's illness is

likely to cause harm to self or others if allowed to remain at liberty, and if the treatment facility is willing to admit the person, the law enforcement officer shall present to the treatment facility the application provided for in subsection (b) of K.S.A. 59-2909 and amendments thereto. If the physician or psychologist on duty at the treatment facility does not believe the person to be a mentally ill person, the law enforcement officer shall release the person.

(b) If the physician or psychologist on duty at the treatment facility states that, in the physician's or psychologist's opinion, the person is a mentally ill person but the treatment facility is unwilling to admit the person, the treatment facility shall provide a suitable facility in which the person may be detained by the law enforcement officer until the close of the first day the district court of the county is open for the transaction of business, unless the court orders that the person remain in custody pursuant to the provisions of K.S.A. 59-2912 and amendments thereto. If there is no treatment facility available to receive the person within the territorial limits of the law enforcement officer's jurisdiction, the law enforcement officer may detain the person in any other suitable place until the close of the first day the district court of the county is open for the transaction of business, unless the court orders that the person remain in custody pursuant to the provisions of K.S.A. 59-2912 and amendments thereto. If a law enforcement officer detains a person pursuant to this subsection, the law enforcement officer shall file the application provided for in subsection (a) of K.S.A. 59-2912 and amendments thereto, as soon as the court is open for the transaction of business. If the place for such detention, other than a treatment facility, is located in a catchment area in which there are one or more participating mental health centers, no person shall be detained by a law enforcement officer pursuant to this subsection in a nonmedical facility used for the detention of persons charged with or convicted of a crime.

History: L. 1965, ch. 248, 8; L. 1976, ch. 243, 8; L. 1976, ch. 242, 70; L. 1977, ch. 200, 1; L. 1978, ch. 223, 4; L. 1986, ch. 211, 5; L. 1990, ch. 92, 20; Jan. 1, 1991.

K.S.A. 59-2909

59-2909. Emergency observation and treatment; authority of treatment facility; procedure. (a) A treatment facility may admit and detain any person for emergency observation and treatment upon an order of protective custody issued by a district court pursuant to K.S.A. 59-2912 and amendments thereto.

(b) A treatment facility may admit and detain any person for emergency observation and treatment upon written application of any law enforcement officer having custody of any person pursuant to K.S.A. 59-2908 and amendments thereto, except that no person shall be admitted to a state psychiatric hospital for emergency observation and treatment, if there are one or more participating mental health centers located in the catchment area in which the state psychiatric hospital is located, unless a written statement recommending the emergency observation and treatment at a state psychiatric hospital has been obtained from a qualified mental health professional. The application shall state:

(1) The name and address of the person, if known;

(2) the name and address of the person's spouse or nearest relative, if known;

(3) the officer's belief that the person is a mentally ill person and because of the person's illness is likely to cause harm to self or others if not immediately detained;

(4) the factual circumstances under which the person was taken into custody; and

(5) the fact that the law enforcement officer will submit the application provided for in subsection (a) of K.S.A. 59-2912 and amendments thereto, by 5:00 p.m. of the next full day that

the district court is open for the transaction of business or that the officer has been informed by a parent, guardian or other person in loco parentis to the person taken into custody that such parent, guardian or other person, whose name shall be stated in the application, will file the application provided for in subsection (b) of K.S.A. 59-2912 and amendments thereto within that time.

(c) A treatment facility may admit and detain any person are emergency observation and treatment upon the written application of any individual, except that a state psychiatric hospital shall not admit and detain any such person, if there are one or more participating mental health centers located in the catchment area in which the state psychiatric hospital is located, without a written statement authorizing such admission from a qualified mental health professional. The application shall state:

(1) The name and address of the person, if known;

(2) the name and address of the person's spouse or nearest relative, if known;

(3) the applicant's belief that the person is a mentally ill person and because of the person's illness is likely to cause harm to self or others if not immediately detained;

(4) the circumstances in support of that belief; and

(5) the fact that the applicant will submit the application provided for in subsection (b) of K.S.A. 59-2912 and amendments thereto by 5:00 p.m. of the next full day that the district court is open for transaction of business.

(d) Application of an individual under subsection (c) shall be accompanied by a statement in writing of a physician or psychologist confirming the existence of the described condition of the person and, upon the filing of the application, the head of the treatment facility or the designee of the head of the treatment facility may authorize and order in writing any law enforcement officer or other person to take into custody and transport the person to the treatment facility, except that no person shall be transported to a state psychiatric hospital under this subsection, if there are one or more participating mental health centers located in the catchment area in which the state psychiatric hospital is located, unless a written statement recommending that the person be transported to a state psychiatric hospital has been obtained from a qualified mental health professional.

(e) Any treatment facility or personnel thereof who in good faith render treatment in accordance with law to any person admitted pursuant to subsection (b) or (c), shall not be liable in a civil or criminal action based upon a claim that the treatment was rendered without legal consent.

History: L. 1965, ch. 348, 9; L. 1976, ch. 243, 9; L. 1976, ch. 242, 71; L. 1978, ch. 223, 5; L. 1986, ch. 211, 6; L. 1990, ch. 92, 21; Jan. 1, 1991.

K.S.A. 59-2910

59-2910. Same; person's right to communicate with others; notice of admission; medication and therapy. (a) Whenever any person has been taken into custody pursuant to K.S.A. 59-2908, pursuant to subsection (d) of K.S.A. 59-2909 or pursuant to K.S.A. 59-2912, and amendments thereto, the person shall be informed immediately by the individual taking the person into custody that the person is entitled to contact immediately the person's legal counsel or next of kin, or both. The person taken into custody shall be allowed to communicate by reasonable means with a reasonable number of persons and may consult privately with an attorney, a personal physician or psychologist, minister of religion, including Christian Science practitioner and at least one member of the person's family or guardian or other person in loco parentis, and shall be immediately notified of these rights upon being taken into custody.

(b) Whenever any person has been admitted to a treatment facility pursuant to K.S.A. 59-2909 and amendments thereto, the head of the treatment facility or the designee of the head of the treatment facility shall immediately notify the person's legal counsel or legal guardian, spouse or any next of kin, if known, unless the applicant was the person's legal counsel or legal guardian, spouse or next of kin. The person shall be given a copy of the application of the law enforcement officer or individual, or a copy of the order of protective custody. The person shall be allowed to communicate by all reasonable means with a reasonable number of persons at reasonable hours of the day and night and may consult privately with an attorney, a personal physician or psychologist, minister of religion, including Christian Science practitioner and at least one member of the person's family or guardian or other person in loco parentis, and shall be immediately notified or these rights upon admission.

(c) Whenever any person has been taken into custody pursuant to K.S.A. 59-2908, pursuant to subsection (d) of K.S.A. 59-2909 or pursuant to K.S.A. 59-2912, and amendments thereto, a treatment facility may not administer to the person any medication or therapy which will alter the person's mental state in such a way as to adversely affect the person's judgment, unless such medication or therapy is necessary to sustain life or protect the person or others. A report of all treatment provided along with any written consent shall be filed with the court.

History: L. 1965, ch. 348, 10; L. 1976, ch. 243, 10; L. 1986, ch. 211, 7; July 1.

K.S.A. 59-2911

59-2911. Emergency observation; discharge. The head of the treatment facility shall discharge any person admitted pursuant to subsection (a) of K.S.A. 59-2909 and amendments thereto when the order of protective custody expires and shall discharge any person admitted pursuant to subsection (b) or (c) of K.S.A. 59-2909 and amendments thereto not later than 5:00 p.m. of the next full day that the district court of the county where the person is present is open for the transaction of business after the admission date of the person unless the district court orders that such person remain in custody pursuant to the provisions of K.S.A. 59-2912 and amendments thereto.

History: L. 1965, ch. 348, 11; L. 1976, ch. 243, 11; L. 1976, ch. 242, 72; L. 1978, ch. 223, 6; L. 1986, ch. 211, 8; July 1.

K.S.A. 59-2912

59-2912. Order of protective custody; probable cause hearing; procedure. (a) A district court may issue an order of protective custody upon the verified application of any law enforcement officer or other individual. The application shall state:

(1) The name and address of the person with respect to whom the order is sought, if known;

(2) the name and address of the person's spouse, legal counsel or nearest relative, if known;

(3) the affiant's belief that the person is a mentally ill person and because of the person's illness is likely to cause harm to self or others if not immediately detained;

(4) the factual allegations upon which subsection (a)(3) is based; and

(5) that the application provided for in K.S.A. 59-2913 and amendments thereto has been filed.

An order of protective custody issued under this subsection shall only be valid until 5:00 p.m. of the second full day the district court is open for the transaction of business after the date of

issuance. The district court shall not issue successive orders of protective custody pursuant to this subsection.

(b) A district court may issue an order of protective custody upon the verified application of any person, if the application provided for in K.S.A. 59-2913 and amendments thereto has been filed in the court, and the court has found following a hearing that there is probable cause to believe that the person with respect to whom the application has been filed is a mentally ill person. No order of protective custody shall be issued pursuant to this subsection until the court has held a hearing to determine probable cause, which hearing shall be held not later than 5:00 p.m. of the second full day the district court is open for the transaction of business after the filing of the application provided for by K.S.A. 59-2913 and amendments thereto. The person with respect to whom the application has been filed shall be present at the hearing, unless the attorney for the person requests that the person's presence be waived and the court finds that the person's presence at the hearing would be injurious to the person's welfare. The court shall enter in the record of the proceedings the facts upon which the court has found that the presence of the person at the hearing would be injurious to such person's welfare. Notwithstanding the foregoing provisions of this subsection, if the person with respect to whom the application has been filed requests in writing to the court or to such person's attorney that the person be present at the hearing, the person's presence cannot be waived.

(c) The applicant and the person with respect to whom the application has been filed shall be notified of the time and place of the hearing and afforded an opportunity to appear at the hearing, to testify and to present and cross-examine witnesses. If the person with respect to whom the application has been filed has not retained an attorney the court shall appoint an attorney for the person in the same manner as an attorney is appointed under the provisions of K.S.A. 59-2914 and amendments thereto. All persons not necessary for the conduct of the proceedings may be excluded. The hearing shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the person with respect to whom the application has been filed. The court shall receive all relevant and material evidence which may be offered. The rules governing evidentiary and procedural matters at hearings under this section shall be applied so as to facilitate informal, efficient presentation of all relevant, probative evidence and resolution of issues with due regard to the interests of all parties. The facts or data upon which a duly qualified expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination. If the applicant is not represented by counsel, the county or district attorney shall represent the applicant, prepare all necessary papers, appear at the hearing and present such evidence as the county or district attorney determines to be of aid to the court in determining whether or not there is probable cause to believe that the person with respect to whom the application has been filed is a mentally ill person.

If the court determines from the evidence that there is probable cause to believe that the person with respect to whom the application has been filed is a mentally ill person, the court shall issue an order of protective custody; otherwise, the court shall terminate the proceedings.

(d) The order of protective custody issued pursuant to provisions of this section may authorize a health officer, physician, law enforcement officer or other person to take the person with respect

to whom the application has been filed into custody and to transport and place the person in a designated treatment facility, except as otherwise provided herein, or other suitable place willing to receive the person and may designate the place of detention, but no person shall be detained in protective custody in a nonmedical facility used for the detention of persons charged with or convicted of a crime unless other facilities are not available and the place of such protective custody is in a catchment area in which there are no participating mental health centers. In lieu of such detention, the order of protective custody may allow the person with respect to whom the application has been filed to be at liberty, subject to such conditions as the court may impose, pending the hearing provided for in K.S.A. 59-2917 and amendments thereto. The court shall not provide in any order of protective custody that the person be transported and placed or detained at a state psychiatric hospital unless a written statement recommending such placement or detention has been obtained from a qualified mental health professional. If a designated treatment facility is unwilling to admit the person, the participating mental health center shall provide a suitable facility in which the person may be detained in protective custody, but no person shall be so detained in a nonmedical facility used for detention of persons charged with or convicted of a crime.

History: L. 1965, ch. 348, 12; L. 1976, ch. 243, 12; L. 1976, ch. 242, 73; L. 1977, ch. 200, 2; L. 1978, ch. 223, 7; L. 1986, ch. 211, 9; L. 1990, ch. 92, 22; Jan. 1, 1991.

K.S.A. 59-2913

59-2913. Application for determination of mentally ill person; content. A verified application to determine whether a person is a mentally ill person may be filed in the district court of the county of such person's residence or presence by any person. The application shall state: (1) The applicant's belief that such person is a mentally ill person and facts upon which such beliefs are based;

(2) the name, age, residence, and present address of such person, if known to the applicant;

(3) the name and address of the nearest relatives of such person, if known to the applicant, and if not known, that the applicant has made diligent inquiry to learn the name of such relatives;

(4) the pecuniary condition of such person to the extent known by the applicant;

(5) the name and address of such person, if any, having custody and control of the person for whom the application has been filed, if known to the applicant;

(6) the names and addresses of witnesses by whom the truth of the application may be proved;

(7) a request that the court make a determination that the person for whom the application has been filed is a mentally ill person.

Unless, the court allows an application to be accompanied by a verified statement by the applicant that the person named in the application has refused to submit to an examination by a physician, psychologist, any such application shall be accompanied by a signed statement of a physician, psychologist or the designee of the head of a treatment facility, stating that said physician, psychologist or designee has examined the person for whom the application has been filed and the results of the examination on the issue of whether such person is a mentally ill person.

History: L. 1965, ch. 348, 13; L. 1976, ch. 243, 13; L. 1976, ch. 242, 74; L. 1978, ch. 224, 1; July 1.

K.S.A. 59-2914

59-2914. Preliminary orders; procedure. (a) Upon the filing of the application provided for in K.S.A. 59-2913 and amendments thereto, the district court shall issue the following:

(1) An order fixing the time and place of the hearing on the application. Such hearing, in the court's discretion, may be conducted in the courtroom, a treatment facility or other suitable place. The time designated in the order shall in no event be earlier than seven days or later than 14 days after the date of the filing of the application, except that if the proposed patient absents the patient's self and the service of the notice on the proposed patient cannot be served because of the absence, the time of absence shall not be included in computing the time of the expiration of the fourteen-day limitation above set out.

(2) An order that the proposed patient appear at the time and place of the hearing. The proposed patient shall be present at the hearing, unless the attorney for the proposed patient requests that the proposed patient's presence be waived and the court finds that the proposed patient's presence at the hearing would be injurious to the proposed patient's welfare. The court shall enter in the record of the proceedings the facts upon which the court has found that the presence of the proposed patient at the hearing would be injurious to the proposed patient's welfare. Notwithstanding the foregoing provisions of this subsection, if the proposed patient requests in writing to the court or to such person's attorney that the proposed patient be present at the hearing, the proposed patient's presence cannot be waived.

(3) An order appointing an attorney to represent the proposed patient at all stages of the proceedings and until all orders resulting from such proceedings are terminated. The court shall give preference, in the appointment of the attorney, to any attorney who has represented the proposed patient in other matters if the court has knowledge of the prior relationship. The proposed patient shall have the right to engage an attorney of the proposed patient's own choice and, in such event, the attorney appointed herein shall be relieved of all duties by the court.

(4) An order that the proposed patient shall appear at a time and place that is in the best interests of the patient to consult with the proposed patient's court-appointed attorney, which time shall be at least five days prior to the date set for the hearing under K.S.A. 59-2917 and amendments thereto.

(5) A notice in the manner provided for in K.S.A. 59-2916 and amendments thereto.

(6) Upon the motion of any party or on the court's own motion, an order of investigation, which investigation may inquire into the proposed patient's character, family relationships and past conduct; whether or not the proposed patient is likely to cause harm to self or others if allowed to remain at liberty; and other pertinent factors. The court may designate a treatment facility, licensed social worker, court services officer or social service agency to make such investigation and to promptly make a written report to the court, which report shall be made available only to counsel for the parties at least five days prior to the date set for the hearing under K.S.A. 59-2917 and amendments thereto, except that no order for investigation shall designate a state psychiatric hospital, if there are one or more participating mental health centers located in the catchment area in which the state psychiatric hospital is located. In any such case, the court may designate a qualified mental health professional or a case manager employed by a participating mental health center to conduct an investigation pursuant to this section.

(7) Upon the motion of any party, containing those statements required by K.S.A. 59-3009 and amendments thereto, orders necessary to make a determination of the need for a guardian or conservator, or both, to act on behalf of the proposed patient. For the purposes of determining whether a guardian or conservator is needed, the hearings required by K.S.A. 59-2917 and

59-3013, and amendments thereto, may be consolidated.

(b) Nothing in this section shall prevent the court from granting an order of continuance, for good cause shown, to either party for no longer than seven days, except that such limitation does not apply to a request for an order of continuance made by the proposed patient. The court also, upon request by either party, may advance the date of the hearing if necessary in the interests of all concerned.

History: L. 1965, ch. 348, 14; L. 1967, ch. 317, 1; L. 1970, ch. 230, 4; L. 1976, ch. 243, 14; L. 1976, ch. 242, 75; L. 1977, ch. 200, 3; L. 1986, ch. 211, 10; L. 1990, ch. 92, 23; Jan. 1, 1991.

K.S.A. 59-2914a

59-2914a. Mental evaluation; procedure. (a) After the filing of the application provided for in K.S.A. 59-2913 and amendments thereto and prior to the hearing provided for in K.S.A. 59-2917 and amendments thereto, the court shall issue an order for mental evaluation. The order of mental evaluation shall be served in the manner provided for in K.S.A. 59-2916 and amendments thereto. It shall order the proposed patient to submit to a mental evaluation and to undergo such evaluation as may be designated by the court in the order, except that any proposed patient who is not under an order of protective custody issued pursuant to K.S.A. 59-2912 and amendments thereto and who requests a hearing pursuant to subsection (b), need not submit to such evaluation until the hearing has been held and the court finds that there is probable cause to believe that the proposed patient is a mentally ill person. The evaluation may be held at a treatment facility, the home of the proposed patient or such other suitable place that the court determines is not likely to have a harmful effect on the health of the proposed patient. A state psychiatric hospital shall not be ordered to evaluate any proposed patient, if there are one or more participating mental health centers located in the catchment area in which the state psychiatric hospital is located, unless the court has been informed in writing that the evaluation cannot be performed at a participating mental health center. The written authorization to have the evaluation performed at a state psychiatric hospital must be presented to the court by the administrator of the participating mental health center or by a qualified mental health professional.

(b) Whenever a proposed patient requests a hearing pursuant to subsection (a), the hearing shall be held within a reasonable time thereafter. The applicant and the proposed patient shall be notified of the time and place of the hearing, afforded an opportunity to testify, and to present and cross-examine witnesses. The proposed patient shall be present at the hearing, and the patient's presence cannot be waived. All persons not necessary for the conduct of the proceedings may be excluded. The hearing shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the proposed patient. The court shall receive all relevant and material evidence which may be offered. If the applicant is not represented by counsel, the county or district attorney shall represent the applicant, prepare all necessary papers, appear at the hearing and present such evidence as is determined to be of aid to the court in determining whether or not there is probable cause to believe that the proposed patient is a mentally ill person. If the court determines from the evidence that there is probable cause to believe that the proposed patient is a mentally ill person, the court shall issue the order of mental evaluation; otherwise, the court shall terminate all proceedings. At the time designated by the court in the order, but in no event later than three days prior to the date of the hearing provided for in K.S.A. 59-2917 and amendments thereto, the examiner shall submit to the court a report, in writing, of the evaluation which report also shall

be made available to counsel for the parties at least three days prior to such hearing. The report also shall be made available to the proposed patient and to whomever the patient directs, unless for good cause recited in the order, the court orders otherwise. Such report shall state that the examiner has made an examination of the proposed patient and shall state the results of the examination on the issue of whether the proposed patient is a mentally ill person and the examiner's opinion as to the least restrictive treatment alternative which will protect the proposed patient and others and allow for the improvement of the proposed patient.
History: L. 1976, ch. 243, 15; L. 1986, ch. 211, 11; L. 1990, ch. 92, 24; Jan. 1, 1991.

K.S.A. 59-2915

59-2915. [Repealed.]
History: L. 1965, ch. 348, 15; L. 1973, ch. 186, 28; L. 1976, ch. 243, 16; L. 1976, ch. 242, 76; Repealed, L. 1986, ch. 211, 40; July 1.

K.S.A. 59-2916

59-2916. Notice; contents. (a) The notice required by K.S.A. 59-2914 and amendments thereto shall be given to the proposed patient named in the application, the proposed patient's guardian if there is one, the attorney appointed pursuant to K.S.A. 59-2914 and amendments thereto and such other persons as the court directs. The notice shall also be given to the participating mental health center which has jurisdiction over the county where the proposed patient is located, if there is a participating mental health center which has jurisdiction over such county.
(b) The notice shall state:
(1) That an application has been filed, alleging that the proposed patient is a mentally ill person and requesting that the court order treatment;
(2) the time and place of the hearing;
(3) the name of the attorney appointed to represent the proposed patient and the time and place where the proposed patient shall consult with such attorney; and
(4) that the proposed patient has a right to demand a hearing before a jury.
(c) The court may order any of the following to serve the notice:
(1) The physician or psychologist currently administering to the proposed patient, if the physician or psychologist consents;
(2) the head of the local mental health clinic or the designee thereof;
(3) the local health officer or such officer's designee;
(4) the secretary of social and rehabilitation services or the secretary's designee;
(5) any law enforcement officer; or (6) the attorney of the proposed patient.
The notice shall be served personally on the proposed patient and the attorney appointed pursuant to K.S.A. 59-2914 and amendments thereto as soon as possible, but not less than 10 days prior to the date of the hearing, and immediate return thereof shall be made. Unless otherwise ordered by the court, notice shall be served on the proposed patient by a nonuniformed person. Notice to all other persons shall be made in the manner directed by the court, but such notice shall not be given less than 10 days prior to the date of the hearing.
History: L. 1965, ch. 348, 16; L. 1972, ch. 219, 2; L. 1973, ch. 186, 29; L. 1976, ch. 243, 17; L. 1980, ch. 182, 16; L. 1986, ch. 211, 12; L. 1990, ch. 201, 1; L. 1990, ch. 92, 25; Jan. 1, 1991.

K.S.A. 59-2916a

59-2916a. Medication and therapy prior to hearing. Within 48 hours immediately prior to and during any hearing provided for by this act, a treatment facility may not administer to a proposed patient any medication or therapy which will alter the proposed patient's mental state in such a way as to adversely affect the proposed patient's judgment or hamper the proposed patient in preparing for or participating in the hearing, unless such medication or therapy is necessary to sustain life or protect the proposed patient or others. Counsel for the proposed patient may examine any physician who has administered medication to the proposed patient within 48 hours prior to any hearing provided for by this act. If in any case the court determines that medication has been administered which adversely affects the proposed patient's judgment or hampers the proposed patient in preparing for or participating in the hearing, the court shall order that no further medication which alters the proposed patient's mental state be administered until conclusion of any hearing provided for by this act unless the court finds that the medication is necessary to sustain the patient's life, and the court shall grant to the proposed patient a reasonable continuance.
History: L. 1976, ch. 243, 18; L. 1986, ch. 211, 13; July 1.

K.S.A. 59-2917

59-2917. Hearing on the petition; procedure; court orders. (a) The hearing shall be held at the time and place specified in the court's order unless a continuance as provided in K.S.A. 59-2914, 59-2916a or 59-2918, and amendments thereto, has been granted. The hearing shall be held to the court only, unless the proposed patient, at least four days prior to the time of the hearing, demands in writing a hearing before a jury.

(b) The jury, if one is demanded, shall consist of six persons. The jury panel shall be selected as provided by law and from such panel 12 qualified jurors, who have been passed for cause, shall be empaneled. Prior service as a juror in any court shall not exempt, for that reason, any person from jury service hereunder. From the panel so obtained, the proposed patient or the proposed patient's attorney shall strike one name; then the applicant, or the applicant's attorney, shall strike one name; and so on alternately until each has stricken three names. If either party neglects or refuses to aid in striking the names, the court shall strike a name on behalf of such party. If 12 qualified jurors cannot be so empaneled, the court shall draw from such panel or list, by lot, sufficient additional names to empanel 12 qualified jurors.

(c) The applicant and the proposed patient shall be afforded an opportunity to appear at the hearing, to testify, and to present and cross-examine witnesses. All persons not necessary for the conduct of the proceedings may be excluded. The hearings shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the proposed patient. The court shall receive all relevant and material evidence which may be offered, including the testimony or written findings and recommendations of the treatment facility or examiner who has examined or evaluated the proposed patient and the testimony or written findings and recommendations of the investigator appointed pursuant to K.S.A. 59-2914 and amendments thereto. Such evidence shall not be privileged for the purpose of this hearing.

(d) The rules governing evidentiary and procedural matters at hearings under this section shall be applied so as to facilitate informal, efficient presentation of all relevant, probative evidence

and resolution of issues with due regard to the interests of all parties.

(e) If the applicant is not represented by counsel, the county or district attorney shall represent the applicant, prepare all necessary papers, appear at the hearing and present such evidence as the county or district attorney shall determine to be of aid to the court in determining whether the proposed patient is a mentally ill person.

(f) Upon the completion of the hearing, if the court or jury finds by clear and convincing evidence that the proposed patient is a mentally ill person, the court shall order treatment for such person at a treatment facility, except that the court shall not order treatment at state psychiatric hospital, if there are one a more participating mental health centers located in the catchment area in which the state psychiatric hospital is located, unless the court has received a written recommendation for treatment at a state psychiatric hospital from a qualified mental health professional. In the event the qualified mental health professional does not recommend treatment at a state psychiatric hospital, the participating mental health center which employs or contracts with the qualified mental health professional shall assume responsibility for securing any and all treatment required by the proposed patient. An order for treatment in a treatment facility, except a state psychiatric hospital, shall be conditioned upon the consent of such treatment facility.

(g) When the court orders treatment, it shall retain jurisdiction to modify, change or terminate such order.

(h) If, upon the completion of the hearing the court or jury finds by clear and convincing evidence that the proposed patient is a mentally ill person has not been shown, the court shall enter the finding in the record and by an appropriate order shall terminate the proceedings.

History: L. 1965, ch. 348, 17; L. 1976, ch. 243, 19; L. 1976, ch. 242, 77; L. 1978, ch. 223, 8; L. 1981, ch. 230, 1; L. 1986, ch. 211, 14; L. 1990, ch. 92, 26; Jan. 1, 1991.

K.S.A. 59-2917a

59-2917a. [Repealed.]

History: L. 1976, ch. 243, 21; L. 1977, ch. 310, 3; L. 1978, ch. 225, 1; L. 1981, ch. 230, 2; Repealed, L. 1986, ch. 211, 40; July 1.

K.S.A. 59-2918

59-2918. Continuance of hearings; order for short-term treatment. (a) The proposed patient, at any time prior to the hearing provided for in K.S.A. 59-2917 and amendments thereto, may request, in writing, that the hearing be continued for 90 days so that the court may make an order of referral for short-term treatment. Upon receipt of such a request, the court may refer the proposed patient for a period of time not to exceed 90 days, for short term treatment, to any treatment facility. An order of referral for treatment in any treatment facility, shall be conditioned upon the consent of such treatment facility, except that no order of referral for treatment in a state psychiatric hospital shall be entered, if there are one or more participating mental health centers located in the catchment area in which the state psychiatric hospital is located, unless the court has received a written recommendation for such admission from a qualified mental health professional. The court may not issue an order of referral unless the attorney representing the proposed patient has filed a statement, in writing, stating that the attorney has explained to the proposed patient the nature of the order of referral and the right to a hearing before a court or jury

to determine whether the proposed patient is a mentally ill person.

(b) Any proposed patient who has been referred for short-term treatment under this section may be accepted for voluntary admission in a treatment facility pursuant to K.S.A. 59-2905 and amendments thereto. When the proposed patient has been admitted as a voluntary patient, the treatment facility shall file written notice of the patient's acceptance as a voluntary patient in the court which had ordered the referral. The filing of such notice shall constitute a dismissal of the pending application to determine whether the proposed patient is a mentally ill person.

(c) Unless the proposed patient has been accepted as a voluntary patient by a treatment facility, the facility treating the proposed patient, not later than 14 days prior to the expiration date of the referral period, shall file a written report of its findings and recommendations with the court. The court shall then set the date for the hearing provided for in K.S.A. 59-2917 and amendments thereto. Such hearing date shall not be later than the expiration date of the referral, unless continued at the proposed patient's request.

History: L. 1965, ch. 348, 18; L. 1976, ch. 243, 20; L. 1986, ch. 211, 15; L. 1990, ch. 92, 27; Jan. 1, 1991.

K.S.A. 59-2918a

59-2918a. Order for outpatient treatment. (a) Following the hearing on the petition as provided for in K.S.A. 59-2917 and amendments thereto, or prior to the entry of an order provided for in K.S.A. 59-2918 and amendments thereto, if the court finds that the proposed patient is a mentally ill person, the court, as an alternative to inpatient treatment, may enter an order for outpatient treatment at a mental health center or other private treatment facility capable of providing outpatient care. Such an order for outpatient treatment may be entered by the court only if the court finds that outpatient treatment will not constitute a danger to the community and that the patient is not likely to cause harm to self or others while under outpatient treatment. In considering this issue the court shall take into consideration all relevant factors, including but not limited to, the degree of supervision and type of outpatient treatment proposed and available, the preferences of the patient and the degree of security to the community provided for under outpatient treatment.

(b) No order for outpatient treatment shall be entered unless the outpatient treatment facility has consented to treat the patient on an outpatient basis under the terms and conditions set forth by the court, except that no order for outpatient treatment shall be refused by a participating mental health center.

(c) If outpatient treatment is ordered, the order shall state the specific conditions to be followed by the patient and shall include the general condition that the patient shall follow all directives and treatment methods established by the head of the treatment facility or the head's designee. The court shall also make such orders as are appropriate to provide for transportation to the outpatient treatment facility, for the transfer of the copies of the patient's records to the outpatient treatment facility and provisions for monitoring the proposed patient's progress and compliance with outpatient treatment.

(d) (1) The court shall retain jurisdiction to modify or revoke its order for outpatient treatment at any time on its own motion, on the motion of any counsel of record or upon notice from the treatment facility of any need for new conditions in the order for outpatient treatment or of material noncompliance by the patient with the order for outpatient treatment. Revocation or modification may be ordered by ex parte order or by order of the court after notice and hearing.

(2) The treatment facility shall immediately report to the court any material noncompliance by the patient with the outpatient treatment order. Such notice may be verbal or by telephone but shall be followed by a verified written notice to the court and to counsel for all parties. Upon receipt of telephone, verbal or written verified notice of noncompliance, the court may enter an ex parte order of protective custody revoking the outpatient treatment order and providing for immediate commitment of the patient to an inpatient treatment facility.

(3) After the entry of an ex parte order revoking or modifying the order for outpatient treatment, a copy of the order shall be served upon the patient and the patient's attorney. Any party to the matter, including the petitioner, the state or the patient may request a hearing on the matter if the request is filed within five days from the date of service of the ex parte order upon the patient. The court may also order such a hearing on its own motion within five days from the date of service of the notice. If no request or order for hearing is filed-within the five-day period, the ex parte order shall become the final order of the court. If a hearing is requested, a written motion for revocation or modification of the outpatient treatment order shall be filed by the state or the petitioner and a hearing shall be held thereon within five days after the filing of the motion. If upon hearing the court finds that the conditions of the outpatient treatment order have not been met, the court may enter an order for inpatient treatment or may continue the order for outpatient treatment with different terms and conditions in accordance with this section.

(e) The outpatient treatment facility shall comply with the provisions of K.S.A. 1993 Supp. 59-2919a and amendments thereto concerning filing of medical records summaries each 90 or 180 days during the time the outpatient treatment order is in effect and the court shall receive and process such reports in the same manner as reports received from an inpatient treatment facility.
History: L. 1986, ch. 211, 17; L. 1990, ch. 92, 28; Jan. 1, 1991.

K.S.A. 59-2919

59-2919. Order for admission to state psychiatric hospital. All orders of referral to or treatment in a state psychiatric hospital shall be made on the form prescribed by the secretary of social and rehabilitation services. Admission shall be to the state psychiatric hospital previously designated by the secretary of social and rehabilitation services to accept persons from the area of the court's jurisdiction and, if requested by the head of the treatment facility, at a time specified by the head of the treatment facility, which time shall be not more than 15 days after the date of the order. Notice of the order shall be given immediately to the designated psychiatric hospital.
History: L. 1965, ch. 348, 19; L. 1976, 243, 22; L. 1986, ch. 211, 16; July 1.

K.S.A. 59-2919a

59-2919a. Hearing to review status of patient; procedure. (a) When treatment has been ordered for a person pursuant to K.S.A. 59-2917 and amendments thereto, the patient shall be entitled to request a hearing each 90 days during the first six months of treatment and every 180 days thereafter to determine whether or not such patient continues by clear and, convincing evidence to be a mentally ill person. The district court having jurisdiction to modify, change or terminate the order of treatment shall conduct the hearings. At least two weeks prior to the end of each period of treatment, the head of the treatment facility furnishing treatment to the patient shall provide to the court a summary of the medical records of the patient. Upon the receipt of the

summary, the court shall notify the patient's attorney of record that the summary has been received. If there is no attorney of record for the patient, the court shall appoint an attorney and notify such attorney that the summary has been received.

(b) When the attorney for the patient has received notice that the treatment facility has provided the district court with a summary of the medical records of a patient, the attorney shall consult with the patient to determine whether the patient desires a hearing. If the patient desires a hearing, the attorney shall file a written request for a hearing with the district court, which request shall be filed not later than the end of the ninety-day or one-hundred-eighty-day period of treatment. Upon receiving a written request for a hearing, the district court shall set the matter for hearing and give notice of such hearing in the manner provided for notice under K.S.A. 59-2916 and amendments thereto. The hearing shall be held as soon as reasonably practical, but in no event more than 10 days following the filing of the written request for a hearing. The district court shall give notice of the time and place of the hearing to the treatment facility to which the patient was ordered for treatment. The district court shall proceed with the hearing in the same manner and with the same powers as if an application pursuant to K.S.A. 59-2913 and amendments thereto had been filed in the court. The hearing shall be conducted in the same manner as hearings provided for in K.S.A. 59-2917 and amendments thereto, except that the hearing shall be to the court and the patient shall not have the right to demand a jury.

(d) Upon completion of the hearing, if the court finds by clear and convincing evidence that the patient continues to be a mentally ill person, the court shall order continued treatment. If the court finds that it has not been shown by clear and convincing evidence that the patient continues to be a mentally ill person, it shall discharge the patient. A copy of the court's order shall be sent by mail to the patient, the patient's attorney, the patient's guardian or other person in loco parentis and the treatment facility to which the patient had been ordered.

History: L. 1986, ch. 211, 19; July 1.

K.S.A. 59-2920

59-2920. Transportation. All orders of protective custody, referral or treatment shall authorize a relative or other suitable person to transport the individual named in the order to the place of detention or treatment specified in the order. All such orders shall be served by the person transporting the individual named in the order upon the person in charge of the place of detention or treatment or such person's designee and due return thereof made to the court. A female being transported to such place, shall be accompanied by a female attendant, unless she is accompanied by an adult relative. An individual shall not be transported in a marked police car or sheriff's car if other means of transportation are available. The least amount of restraint necessary shall be used in transporting such person.

History: L. 1965, ch. 348, 20; L. 1976, ch. 243, 23; July 1.

K.S.A. 59-2921

59-2921. [Repealed.]

History: L. 1965, ch. 348, 21; L. 1976, ch. 243, 24; Repealed, L. 1986, ch. 211, 40; July 1.

K.S.A. 59-2922

59-2922. Change of venue. After the application provided for in K.S.A. 59-2913 and amendments thereto is filed, the district court at any time, on its own motion or upon the written request of any person, may transfer the venue of any case to the county where the patient is being detained in a treatment facility under the authority issued pursuant to K.S.A. 59-2912, 59-2917 or 59-2918, and amendments thereto. The district court also may transfer the venue of any case to any other county designated by the court if the patient has made a request for the change of venue and the court finds that the patient cannot obtain a fair hearing in the county where the patient is present.

When any order changing venue is issued, the district court issuing such order shall transmit to the district court to which venue was changed a certified copy of all pleadings and orders in the case. The district court issuing such order shall transmit to the district court of the residence of the proposed patient a statement of all court costs incurred by the county of the district court issuing such order and a certified copy of all pleadings and orders in the case.

Any district court to which venue is transferred shall proceed in the case as if the application had been originally filed therein and shall cause notice of the change of venue to be given to the persons and in the manner provided for in K.S.A. 59-2916 and amendments thereto, except that the court need not issue the order for mental evaluation pursuant to K.S.A. 59-2914a and amendments thereto if such order has previously been issued.

Any district court to which venue is transferred shall transmit a statement of any court costs incurred and a certified copy of all pleadings and orders in the case to the district court of the county of the residence of the patient.

History: L. 1965, ch. 348, 22; L. 1967, ch. 318, 1; L. 1976, ch. 243, 25; L. 1976, ch. 242, 78; L. 1977, ch. 201, 1; L. 1978, ch. 105, 17; L. 1982, ch. 239, 1; L. 1986, ch. 211, 18; July 1.

K.S.A. 59-2923

59-2923. [Repealed.]

History: L. 1965, ch. 348, 23; L. 1976, ch. 243, 26; L. 1976, ch. 242, 79; L. 1981, ch. 230, 3; Repealed, L. 1986, ch. 211, 40; July 1.

K.S.A. 59-2924

59-2924. Transfer; discharge; conditional release. (a) The secretary of social and rehabilitation services or the secretary's designee may transfer any patient from any state psychiatric hospital under the secretary's control to any other state psychiatric hospital whenever the secretary or the secretary's designee considers it to be in the best interests of the patient. Except in the case of an emergency, the patient's next of kin or guardian, if one has been appointed, shall be notified of the transfer, and notice shall be sent to the committing court not less than 14 days before the proposed transfer. The notice shall state the location to which the transfer is proposed and state that, upon request of the next of kin or guardian, an opportunity for a hearing on the proposed transfer will be provided by the secretary of social and rehabilitation services prior to such transfer.

(b) The secretary of social and rehabilitation services or the designee of the secretary may

transfer any involuntary patient from any state psychiatric hospital to any state institution for the mentally retarded whenever the secretary of social and rehabilitation services or the designee of the secretary considers it to be in the best interests of the patient. Any patient transferred as provided in this subsection shall remain subject to the same statutory provisions as were applicable at the hospital from which the patient was transferred and in addition thereto shall abide by and be subject to all the rules and regulations of the institution to which the patient has been transferred. Except in the case of an emergency, the patient's next of kin or guardian, if one has been appointed, shall be notified of the transfer, and notice shall be sent to the committing court not less than 14 days before the proposed transfer. The notice shall state the location to which the transfer is proposed and state that, upon request of the next of kin or guardian, an opportunity for a hearing on the proposed transfer will be provided by the secretary of social and rehabilitation services prior to such transfer. No involuntary patient shall be transferred from a state psychiatric hospital to a state institution for the mentally retarded unless the superintendent of the receiving institution has found that the patient is mentally retarded and in need of care and training and that placement in the institution is the least restrictive alternative available. Nothing in this subsection shall prevent the secretary of social and rehabilitation services or the designee of the secretary from allowing a person to be admitted as a voluntary resident to a state institution for the mentally retarded, or from discharging such person from a state psychiatric hospital.

(c) When any proposed patient or involuntary patient has been ordered to any treatment facility pursuant to K.S.A. 59-2909, 59-2912, 59-2917 or 59-2918, and amendments thereto, the head of the treatment facility shall discharge the patient when the patient is no longer in need of treatment in the facility, except that no patient shall be discharged from a state psychiatric hospital, if there is a participating mental health center serving the area where the patient intends to reside, without receiving recommendations from such participating mental health center. The head of the treatment facility shall review and investigate all applications for involuntary admission and, if appropriate, shall divert patients to less restrictive treatment alternatives before further judicial proceedings occur whenever it is deemed appropriate by the head of the treatment facility. If diversion from involuntary treatment is not appropriate, the head of the treatment facility should be prepared to present evidence at the next hearing scheduled for the patient concerning further need for involuntary treatment.

(d) The head of the treatment facility may release any involuntary patient who has been committed for treatment pursuant to K.S.A. 59-2917 or 59-2918, and amendments thereto, on conditional release when the head of the treatment facility believes that (1) the release is in the best interests of the patient and (2) the patient is not likely to cause harm to self or others as long as the patient continues a plan of treatment in the community. The treatment facility shall formulate a plan of treatment for each patient released on conditional release. The plan of treatment may include any conditions which the head of the treatment facility considers to be in the best interests of the patient or necessary to ensure that the patient is not likely to cause harm to self or others. The conditions may include a requirement that the patient be supervised by and report to a treatment facility which shall be responsible for ensuring that the patient complies with the conditions. The treatment facility in the community shall inform the head of the treatment facility from which the patient was discharged of any material noncompliance with the treatment plan. The head of the treatment facility from which the patient is released may change the plan of treatment or the conditions specified in the plan whenever the head considers it to be in the best interests of the patient or necessary to ensure that the patient is not likely to cause harm to self or others. If the patient fails to comply with any conditions of the treatment plan, the head of the facility may revoke the release and order the patient readmitted to the facility. The

head of the treatment facility may authorize and order a law enforcement officer or other person to take into custody and transport the patient to a treatment facility.

Prior to the end of the 120 days on conditional release, and not less often than each 120 days thereafter while a patient is on conditional release, the head of the treatment facility from which the patient is released shall reexamine the facts relating to the treatment of the patient on conditional release.

(e) The head of the treatment facility shall not discharge an involuntary patient from conditional release unless at least seven days' notice of the intention to discharge the patient is given to the patient's guardian, if any, and to any other treatment facility which is involved in the treatment plan for the patient.

(f) Nothing in this section shall be construed to amend or modify or repeal any law relating to the confinement of persons charged with or convicted of a criminal offense.

History: L. 1965, ch. 348, 24; L. 1967, ch. 319, 1; L. 1976, ch. 243, 27; L. 1982, ch. 238, 2; L. 1986, ch. 211, 20; L. 1990, ch. 92, 29; Jan. 1, 1991.

K.S.A. 59-2925

59-2925. Notice of discharge or conditional release. The head of the treatment facility shall notify, in writing, the patient, the patient's attorney and the district court, which has ordered the treatment of the involuntary patient or the district court which has jurisdiction of the patient or the, referral of the proposed patient, of the patient's discharge or conditional release. When a notice of discharge is received, the court shall file the same in the record, which shall terminate the proceedings. When a notice of conditional release is received, the court shali file it in the records.

History: L. 1965; ch. 348, 25; L. 1976, ch. 243, 28; L. 1976, ch. 242, 80; L. 1982, ch. 238, 3; July 1.

K.S.A. 59-2926

59-2926. Unauthorized absence; procedure. (a) If any involuntary patient leaves the place of the patient's treatment without the authority of the head of the treatment facility, the head of the treatment facility may authorize and order, either orally or in writing, a law enforcement officer or other person to take the involuntary patient into custody and transport such patient to a place directed by the head of the treatment facility. If oral authorization is given, it shall be confirmed in writing as soon as reasonably possible.

(b) In addition to the authority set forth in subsection (a), the head of a treatment facility operated by the department of social and rehabilitation services may take such reasonable action as necessary to assure that a patient who is not discharged from the treatment facility or otherwise authorized to leave the treatment facility remains at or is returned to the treatment facility.

History: L. 1965, ch. 348, 26; L. 1976, ch. 243, 29; L. 1986, ch. 211, 21; July 1.

K.S.A. 59-2927

59-2927. Right to humane treatment. Every patient shall receive humane treatment consistent with accepted ethics and practices.
History: L. 1965, ch. 348, 27; L. 1976, ch. 243, 30; July 1.

K.S.A. 59-2927a

59-2927a. Administration of medications and other treatments. (a) Medications and other treatments shall be prescribed, ordered and administered only in conformity with accepted clinical practice. Medication shall be administered only in accordance with the written order of a physician or upon a verbal order noted in the patient's medical records and subsequently signed by the physician. The attending physician shall review regularly the drug regimen of each patient or proposed patient under the physician's care and shall monitor any symptoms of harmful side effects. Prescriptions for psychotropic medications shall be written with a termination date not exceeding 30 days thereafter but may be renewed.

(b) Any patient who is receiving treatment pursuant to the provisions of K.S.A. 59-2909, 59-2912, 59-2917 or 59-2918, and amendments thereto, and who objects to medication prescribed shall have such objection recorded and entered in the patient's medical record. If 'after a full explanation of the reasons for the medication such patient still objects to the medication, it may be administered over the patient's objections. Such objections must be submitted to administrative review by the medical director or psychiatric designee within five days of the objection. In no case shall experimental medication be administered without the patient's consent.

(c) During the course of treatment the responsible physician or psychologist or such person's designee shall consult with the patient, or the patient's guardian, and give consideration to the views the patient or guardian expresses concerning treatment and any alternatives.

(d) Consent for medical or surgical treatments not intended primarily to treat a patient's mental disorder shall be obtained in accordance with applicable law.
History: L. 1986, ch. 211, 26; July 1.

K.S.A. 59-2928

59-2928. Restraints and seclusion. (a) Restraints or seclusion shall not be applied to a patient unless it is determined by the head of the treatment facility or a physician or psychologist to be required to prevent substantial bodily injury to such patient or others. The extent of the restraint or seclusion applied to the patient shall be the least restrictive measure necessary to prevent injury to the patient or others, and the use of restraint or seclusion in a treatment facility other than a licensed adult care home shall not exceed three hours without medical reevaluation, except that such medical reevaluation shall not be required, unless necessary, between the hours of 12:00 midnight and 8:00 a.m. Reevaluation of the use of restraint or seclusion in a treatment facility which is a licensed adult care home shall be made at a frequency specified by the treating physician or psychologist. When restraints or seclusion are applied, there shall be monitoring of the patient's condition at a frequency determined by the treating physician or psychologist, which shall be no less than once per hour. The head of the treatment facility or a physician or psychologist shall sign a statement explaining the treatment necessity for the use of any restraint and seclusion and shall make such statement a part of the permanent treatment record of such patient.

(b) The provisions of subsection (a)shall not prevent, for a period not exceeding two hours without review and approval thereof by the head of the treatment facility or a physician or psychologist:

(1) Staff at the state security hospital from confining patients in their rooms when it is considered necessary for security or proper institutional management;

(2) the use of such restraints as necessary for a patient who is likely to cause physical injury to self or others without the use of such restraints; or

(3) the use of restraints when needed primarily for examination or treatment or to insure the healing process.

History: L. 1965, ch. 348, 28; L. 1976, ch. 243, 31; L. 1986, ch. 211, 22; L. 1988, ch. 203, 1; April 21.

K.S.A. 59-2929

59-2929. Rights of patients. (a) Every patient being treated in any treatment facility, in addition to all other rights preserved by the provisions of this act, shall have the following rights:

(1) To wear the patient's own clothes, keep and use the patient's own personal possessions including toilet articles and keep and be allowed to spend the patient's own money;

(2) to communicate by telephone, both to make and receive confidential calls, and by letter, both to mail and receive unopened correspondence, except that if the head of the treatment facility should deny a patient's right to mail or to receive unopened correspondence under the provisions of subsection (b), such correspondence shall be opened and examined in the presence of the patient;

(3) to conjugal visits if facilities are available for such visits;

(4) to receive visitors each day;

(5) to refuse involuntary labor and to be paid for any work performed other than the housekeeping of the patient's own bedroom and bathroom subject to the provisions of K.S.A. 1993 Supp. 59-2943;

(6) not to be subject to such procedures as psychosurgery, electroshock therapy, experimental medication, aversion therapy or hazardous treatment procedures without the written consent of the patient and the written consent of a parent, guardian or other person in loco parentis, if such patient has a living parent or a guardian or other person in loco parentis;

(7) to have explained, the nature of all medications prescribed, the reason for the prescription and the most common side effects and, if requested, the nature of any other treatments ordered;

(8) to communicate by letter with the secretary of social and rehabilitation services, the head of the treatment facility and any court, physician, psychologist, minister of religion, including Christian Science practitioner or attorney. All such communications shall be forwarded at once to the addressee without examination and communications from such persons shall be delivered to the patient without examination;

(9) to be visited by the patient's physician, psychologist, minister of religion, including Christian Science practitioner or attorney at any time; and

(10) to be informed orally and in writing of the patient's rights under this section upon admission to a treatment facility.

(b) The head of the treatment facility may, for good cause only, restrict a patient's rights under this section, except that the rights enumerated in subsections (a)(5) through (a)(10), and the right to mail any correspondence which does not violate postal regulations, shall not be restricted by

the head of the treatment facility under any circumstances. Each treatment facility shall adopt regulations governing the conduct of all patients being treated in such treatment facility, which regulations shall be consistent with the provisions of this section. A statement explaining the reasons for any restriction of a patient's rights shall be immediately entered on such patient's medical record and copies of such statement shall be available to the patient and the parent, guardian or person in loco parentis, if such patient is less than 18 years of age, and the patient's attorney. In addition, notice of any restriction of a patient's rights shall be communicated to such persons in a timely fashion.

(c) Any person willfully depriving any patient of the rights protected by this section, except for the restriction of such rights in accordance with the provisions of subsection (b), shall be guilty of a class C misdemeanor.

History: L. 1965, ch. 348, 29; L. 1976, ch. 243, 32; L. 1986, ch. 211, 23; July 1.

K.S.A. 59-2930

59-2930. Civil rights of patients. Except as limited by this act, a person shall not lose rights as a citizen, property rights or legal capacity by reason of being a patient, except that the head of the treatment facility may make reasonable rules and regulations concerning the exercise of such rights by the patients in the treatment facility.

History: L. 1965, ch. 348, 30; L. 1976, ch. 243, 33; July 1.

K.S.A. 59-2931

59-2931. Disclosure of records. (a) The district court records, treatment records or medical records of any patient or former patient that are in the possession of any district court or treatment facility shall be privileged and shall not be disclosed except as otherwise provided in this act or under any of the following conditions:

(1) Upon the written consent of (A) the patient or former patient, if an adult who has no guardian; (B) the patient's or former patient's guardian, if any; or (C) a parent, if the patient or former patient is under 18 years of age, except that a patient or former patient who is 14 or more years of age and who requested voluntary admission shall have capacity to consent to release of the records without parental consent. The head of any treatment facility, other than an adult care home, who has the records may refuse to disclose portions of such records if the head of the treatment facility states in writing that such disclosure will be injurious to the welfare of the patient or former patient.

(2) Upon the sole consent of the head of the treatment facility who has the records after a written statement by the head of the treatment facility that such disclosure is necessary for the treatment of the patient or former patient. The head may make such disclosure to the patient or any former patient, the patient's next of kin, any state or national accreditation agency or scholarly investigator without making such determination but the head of the treatment facility shall require, before such disclosure is made, a pledge from any state or national accreditation agency or scholarly investigator that such agency or investigator will not disclose the name of any patient or former patient to any person not otherwise authorized by law to receive such information.

(3) Upon the order of any court of record after a determination by the court issuing the order

that such records are necessary for the conduct of proceedings before it and are otherwise admissible as evidence.

(4) In proceedings under this act, upon the oral or written request of any attorney representing the patient, former patient or applicant.

(5) To appropriate administrative or professional staff of the department of corrections whenever patients have been administratively transferred to the state security hospital or other state psychiatric institutions pursuant to the provisions of K.S.A. 75-5209 and amendments thereto. The patient's or former patient's consent shall not be necessary to release information to the department of corrections.

(b) To the extent the provisions of K.S.A. 65-5601 to 65-5605, inclusive, and amendments thereto are applicable to treatment records or medical records of any patient or former patient, the provisions of K.S.A. 65-5601 to 65-5605, inclusive, and amendments thereto shall control the disposition of information contained in such records.

(c) Willful violation of this section is a class C misdemeanor.

History: L. 1965, ch. 348, 31; L. 1976, ch. 243, 34; L. 1976, ch. 242, 81; L. 1986, ch. 211, 25; L. 1986, ch. 212, 7; July 1.

K.S.A. 59-2932

59-2932. Civil and criminal liability. Any person acting in good faith and without negligence shall be free from all liability, civil or criminal, which might arise out of acting pursuant to this act. Any person who for a corrupt consideration or advantage, or through malice, shall make or join in making or advise the making of any false application, report or order provided for in this act shall be guilty of a class A misdemeanor.

History: L. 1965, ch. 348, 32; L. 1976, ch. 243, 35; July 1.

K.S.A. 59-2933

59-2933. Effect of an order of referral or an order for care or treatment. Neither an order of referral nor an order for treatment made pursuant to this act shall imply an adjudication of incapacity, nor shall either order, create any presumption that the patient, is an incapacitated person.

History: L. 1965, ch. 348, 33; L. 1976, ch. 243, 36; July 1.

K.S.A. 59-2934

59-2934. Costs; payment by residence county, when. In each proceeding the court shall allow and order paid to any individual or institution as part of the costs thereof a reasonable fee and expenses for any professional services ordered performed by the court pursuant to this act other than those performed by any individual or institution under the jurisdiction of the secretary of social and rehabilitation services, but including the fee of counsel for the patient when counsel is appointed by the court and the costs of the county or district attorney incurred in cases involving change of venue. Other costs and fees shall be allowed and paid as are allowed by law for similar services in other cases. The costs shall be taxed to the estate of the patient, to those

bound by law to support such patient or to the county of the residence of the patient as the court having jurisdiction shall direct, except that if a proposed patient is found not to be a mentally ill person, the costs shall not be assessed against such patient's estate but may at the discretion of the court be assessed against the applicant or may, be paid from the general fund of the county of the residence of the proposed patient. Any district court receiving a statement of costs from another district court shall forthwith approve the same for payment out of the general fund of its county except that it may refuse to approve the same for payment only on the ground that the patient is not a resident of its county. In such case it shall transmit the statement of costs to the secretary of social and rehabilitation services who shall determine the question of residence and certify the secretary's findings to each district court. Whenever a district court has sent a statement of costs to the district court of another county and such costs have not been paid within 90 days after the statement was sent, the district court that sent the statement may transmit such statement of costs to the secretary for determination and certification as provided above. If the claim for costs is not paid within 30 days after such certification, an action may be maintained thereon by the claimant county in the district court of the claimant county against the debtor county. The findings made by the secretary of social and rehabilitation services as to the residence of the patient shall be applicable only to the assessment of costs. Any county of residence which pays from its general fund court costs to the district court of another county may recover the same in any court of competent jurisdiction from the estate of the patient or from those bound by law to support such patient, unless the court shall find that the proceedings in which such costs were incurred were instituted without probable cause and not in good faith.
History: L. 1965, ch. 348, 34; L. 1976, ch. 243, 37; L. 1976, ch. 242, 82; L. 1979, ch. 97, 4; Amended, L. 1994, ch. 329, 1; July 1.

K.S.A. 59-2935

59-2935. [Repealed.]
History: L. 1965, ch. 348, 35; Repealed, L. 1976, ch. 243, 45; July 1.

K.S.A. 59-2936

59-2936. Notice of death of patients in treatment facilities. In the event of the sudden or unexpected death of a patient in a treatment facility, the head of the treatment facility shall give notice of such death to the county or district attorney and the coroner. Notice of the death of any proposed patient or involuntary patient shall be given to the district court having jurisdiction which notice shall include the time, place and cause of death.
History: L. 1965, ch. 348, 36; L. 1976, ch. 243, 38; L. 1976, ch. 242, 83; Jan. 10, 1977.

K.S.A. 59-2937

59-2937. Applicability to persons in custody on criminal charges. Nothing in this act shall be, construed to apply to any person alleged or thought to be a mentally ill person who is in custody on a criminal charge, except with the consent of either the prosecuting attorney or trial court.
History: L. 1965, ch. 348, 37; L. 1976, ch. 243, 39; July 1.

K.S.A. 59-2938

59-2938. Habeas corpus; right to apply. No person in custody under the provisions of this act shall be denied the right to apply for writ of habeas corpus.
History: L. 1965, ch. 348, 38; Jan. 1, 1966.

K.S.A. 59-2939

59-2939. Invalidity of part. If any provision of this, act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.
History: L. 1965, ch. 348, 39; Jan. 1, 1966.

K.S.A. 59-2940

59-2940. Issue of sanity upon arrest of certain persons; proceedings. Whenever any person is taken into custody by an arresting officer and such officer has reasonable grounds to believe that such person has violated K.S.A. 21-3420, 21-3421, 21-3422, 21-3502, 21-3503, 21-3504, 21-3505, 21-3506, 21-3507, 21-3508, 21-3509, 21-3510, 21-3511, 21-3512, 21-3513, 21-3602 or 21-3603, and amendments thereto, the officer shall forthwith report such facts to the county or district attorney by a written report under oath, and the county or district attorney may submit such report to the judge of the district court. If the court finds from an examination of the report that there is evidence raising the issue of the sanity of such person who was arrested, the court shall direct the county or district attorney to sign and file a petition to institute proceedings in accordance with the treatment act for mentally ill persons.
History: L. 1965, ch. 228, 1; L. 1973, ch. 115, 1; L. 1976, ch. 242, 84; L. 1986, ch. 211, 27; July 1.

K.S.A. 59-2941

59-2941. Same; report of arresting officer confidential. The arresting officer's report shall not be available to inspection or copy by other persons than the person arrested, such person's attorney, the county attorney and the judge of the district court.
History: L. 1965, ch. 228, 2; L. 1976, ch. 242, 85; Jan. 10, 1977.

K.S.A. 59-2942

59-2942. [Repealed.]
History: L. 1977, ch. 195, 5, 5, 1; Repealed L. 1986, ch. 211, 40; July 1.

K.S.A. 59-2943

59-2943. Right to perform labor. (a) Patients shall have the right to perform labor as part of a therapeutic program.

(b) Patients may not be required to perform labor except as specified in subsection (a)(5) of K.S.A. 59-2929 and amendments thereto, and any patient labor that confers an economic benefit on the institution beyond merely supplementing employee performance of housekeeping tasks and routine institutional maintenance shall be compensated on a reasonable basis.

History: L. 1986, ch. 211, 24; July 1.

K.S.A. 59-2944

59-2944. Admission of patients to state psychiatric hospitals on and after January 1, 1992; procedure upon notice that program has reached capacity. (a) On and after January 1, 1992, and subject to the provisions of subsection (e), no patient shall be admitted to a state psychiatric hospital pursuant to any of the provisions of the treatment act for mentally ill persons, including any court-ordered admissions, if the secretary has notified the supreme court of the state of Kansas and each district court, which has jurisdiction over all or part of the area served by the state psychiatric hospital, that the required program of the state psychiatric hospital has reached capacity and no more patients may be admitted. Following notification that a state psychiatric hospital program has reached its capacity and no more patients may be admitted, any district court, which has jurisdiction over all or part of the area served by such state psychiatric hospital, and any participating mental health center, which serves all or part of the same area, may request that patients be placed on a waiting list maintained by the state psychiatric hospital.

(b) In each such case, as each vacancy at the state psychiatric hospital occurs, the district court and participating mental health center shall be notified, in the order of their previous requests for placing a patient on the waiting list, that a patient may be admitted to the state psychiatric hospital. As soon as the state psychiatric hospital is able to admit patients on a regular basis to a program for which notice has been given under this section, the superintendent of the state psychiatric hospital shall inform the supreme court and each affected district court that the moratorium on admissions is no longer necessary.

(c) The provisions of this section shall be effective on and after January 1, 1992, and shall apply only to those state psychiatric hospital which are located in a catchment area in which there are located one or more participating mental health centers and which are specifically included in the mental health reform phased program, as defined by K.S.A. 39-1602 and amendments thereto.

History: L. 1990, ch. 92, 30; July 1.